Supreme Court, U.S.
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No. 07-917

IN THE

Supreme Court of the United States

PAMELA CARVEL, as Executor of the Estate of Agnes Carvel

Petitioner,

v.

CARVEL FOUNDATION INC., a Company incorporated under the laws of the State of Florida,

Respondent.

THOMAS AND AGNES CARVEL FOUNDATION, Ancillary Administrator LEONARD M. ROSS,

Intervenors

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There exists a void in justice available to executors of foreign estates, whereby i) no foreign law can compel the delivery of U.S. estate assets into the foreign jurisdiction; ii) state probate courts can deny legal standing to a foreign fiduciary; iii) ancillary administrators cannot be compelled to act on the Estate's or the foreign executor's behalf; and iv) District Courts can reject jurisdiction by the "probate exception". The United States Supreme Court should settle the important Federal question concerning the preservation of inalienable Constitutional rights as being superior to the application of the "probate exception", particularly when no probate exists in the United States.

In the estate of a foreign national, granted probated only in the foreign country where the deceased was domiciled; where ancillary administrations protects only domestic state creditors; and where probate does not exists in any U.S. state courts, the questions presented are:

Whether the U.S. District Court can decline to assert international claims of a foreign executor, based on the probate exception to federal jurisdiction, when there is no probate in any state courts; when all assets are not in the custody or control of state probate courts; and when state probate courts have not jurisdiction over foreign estate administration?

Whether a foreign executor who is denied legal standing and protection in the state probate court, and who is also denied federal jurisdiction in the District Court by assertion of lack of subject matter

jurisdiction by the probate exception, has thereby been denied all remedies and protections provided by the First, Fifth, and Fourteenth Amendments to the United States Constitution for: a) redress of grievances; b) equal protection of law; c) due process effecting life, liberty and property?

PARTIES TO THE PROCEEDING

Pamela Carvel is Petitioner. Carvel Foundation Inc. is Respondent. Ancillary administrator Leonard M. Ross and "Thomas and Agnes Carvel Foundation" are intervenors.

The parties to the proceeding below are Petitioner, Pamela Carvel as executor of the Agnes Carvel Estate ("Estate"). Carvel Foundation (a Florida not-for-profit corporation) is named remainder beneficiary of the uncontested Last Will and Testament of Agnes Carvel. The High Court Master named Carvel Foundation to represent the Estate in a procedure formulated in the absence of legal precedent to reimburse the executor after nine years for debts and administrative expenses of the Estate paid by the executor, and obligations incurred for the Estate.

Non-parties were deemed "intervenors" without notice by the District Court to the Carvel Foundation on the New York proceedings. No procedures prescribed by court rules or laws (*Local Civil Rule 12.1; Fed. R. Civ. P. Rule 5* and *Rule 24)* were followed before the non-parties became "intervenors". The non-party intervenors are New York ancillary administrator c.t.a. Leonard Ross ("Ross"), and the identity thieves who by forgery usurped control of

the assets of the "Thomas and Agnes Carvel Foundation" ("foundation usurpers").

[The fifth criminal investigation involving the foundation usurpers is pending with New York State Attorney General Cuomo. Previous investigations resulted in convictions or removal of the usurpers as fiduciaries. Revocation of tax-exempt status, and judicial dissolution based on abuse of the Carvels' restricted gifts and other charity frauds is also pending.

Pamela Carvel is the sole adjudicated Member of the legitimate Thomas and Agnes Carvel Foundation.]

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OPINIONS & ORDERS ENTERED

The opinions below are by the United States Court of Appeals for the Second Circuit (App. 1) and the judgment of the United States District Court for the Eastern District of New York (App. 4)

JURISDICTION

On August 1, 2007 a Summary Order by the United States Court of Appeals for the Second Circuit affirmed the judgment of the United States District Court for the Eastern District of New York asserting the probate exception to subject matter jurisdiction, thereby denying registration of a foreign country money judgment by the High Court of Justice for England and Wales in favor of the Estate's Executor for claim against Agnes Carvel Estate's (London, England) assets that are located in New York banks and other places, but not held by court.

This Court has jurisdiction under 28 U.S.C. § 1254. District Court jurisdiction was based on diversity 28 U.S.C. 1332 (a) and (c) (2).

"In *Cohens* v. *Virginia*, Chief Justice Marshall famously cautioned: "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should ... We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." 6 Wheat. 264, 404 (1821)." *Marshall v. Marshall, 126* S. Ct. 1735 (2006).

STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that

"Congress shall make no law... abridging ... the right of the people ... to petition the Government for a redress of grievances." *U.S. Const.* amend. I.

The Fifth Amendment to the United States Constitution provides, in relevant part, that "No person shall be...deprived of life, liberty, or property, without due process of law." *U.S. Const.* amend. V.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const.* amend. XIV, sec. 1.

Article VI of the *New York Constitution* defines the judiciary. *N.Y. Const.* art. VI

Article VI §7, (Supreme court; jurisdiction) provides, in relevant part, that "a. The supreme court shall have general original jurisdiction in law and equity and the appellate jurisdiction herein provided." *N.Y. Const.* art. VI, §7.

Article VI §12, (Surrogate's courts; judges; jurisdiction) provides, in relevant part, that "f. The provisions of this section shall in no way limit or impair the jurisdiction of the supreme court as set forth in section seven of this article." *N.Y. Const.* art. VI, §12.

New York *Surrogate's Court Procedure Act*, Section 1601 (Legislative declaration of purpose) provides, in relevant part, that "It is the intent and

purpose of this article that ancillary administration shall be granted in this state only when there is an actual administration in the domiciliary jurisdiction. New York *SCPA* s.1601.

Section 1610 (General powers and duties of ancillary fiduciary) provides, in relevant part, that:

"2. The court or any court of this state having jurisdiction may direct a person to whom ancillary letters have been issued to pay from the assets received by him in this state the debts of the decedent due to creditors who reside in this state.

If the amount of all the decedent's debts here and elsewhere exceeds the amount of all the decedent's property applicable thereto the court may direct the ancillary fiduciary to pay such sum to each resident creditor as equals that creditor's share of all distributable assets.

3. The court or any court of the state having jurisdiction may direct the ancillary fiduciary to distribute the remaining assets after the payment of creditors and expenses to those entitled thereto or to otherwise dispose of the assets as justice requires." *SCPA* s.1610(2),(3).

Section 1810. (Claimant's right to action at law or in equity) provides, in relevant part, that "Nothing in this article shall prevent a claimant from commencing an action on his claim at law or in equity," *SCPA* s.1810.

Section 2215 provides, in relevant part, that "3. If any creditor or person interested has received estate assets in excess of the amount determined on the settlement of the account to be due him the court is authorized to direct in the decree repayment by him of the excess to the fiduciary of the estate or

otherwise as justice shall require and the exercise of such power by the court heretofore is confirmed." *SCPA* s.2215(3).

New York *Estates, Powers, and Trusts Law* Part 1, Section 13-1.3 (Assets chargeable with payment of estate obligations; order in which assets appropriated; abatement) provides, in relevant part, that: "(a) All of the property of a decedent, and any income therefrom in the course of estate administration, is chargeable with the payment of ... (1) Administration and reasonable funeral expenses, debts of the decedent and any taxes ... (c) Whenever such property is insufficient to satisfy both the estate obligations ... all dispositions under the will, interests in the decedent's estate abate, for the purpose of paying such estate obligations, in the following order:...(2) Residuary dispositions... (e) Whenever the provisions of this section are inconsistent with the express or implied intention of the testator...prefer certain beneficiaries under his will to others, the property of the estate shall be applied and the interests of beneficiaries under the will shall abate in such manner as is necessary to give effect to the intention of the testator.

STATEMENT OF THE CASE

This is the review of a Summary Order of the United State Court of Appeals for the Second Circuit (App. 1). District Court jurisdiction was based on diversity 28 U.S.C. 1332 (a) and (c) (2). (App. 4)

This is the matter of a foreign creditor's claim as foreign executor of a foreign estate, for reimbursement of foreign obligations incurred on behalf of the deceased and the estate.

Reimbursement should be from the estate's only assets, located in New York but not within the custody of the probate court, and not all within the control of the probate court. Estate assets are disbursed by several parties without court order; without notice to the executor, beneficiaries, or creditors; and without scrutiny.

The Petitioner Pamela Carvel (executor of a multi-million dollar estate, but compelled to appear *pro se* for lack of funds) moved in District Court to confirm a foreign country money judgment to reimburse expenses and obligation incurred as fiduciary to Agnes Carvel since 1991, and as executor on behalf of the Agnes Carvel Estate, London, England, since 1998.

Thomas Carvel was renowned for the "Carvel" soft ice cream franchise system and his genius for in-house advertisements for "Carvel" products. "Carvel" innovations and advertisements are archived at the Smithsonian Institution's National Museum of American History. Agnes Carvel advanced the first money to her future husband Tom to begin the couple's joint business relationship that lasted over 50 years. Tom's brother Bruce Carvel (Pamela's father) created the first Carvel continuous ice cream freezers and formulas that became the trademark of Carvel products.

Tom was found dead on October 21, 1990 11 months to the day after selling jointly owned Carvel Corp. stock to "investment bankers" for Bahraini money. Tom's death certificate was forged to evade an autopsy. The week before he died, Tom estimated the family wealth to be over $250 million in jointly owned cash, real estate and Treasury securities. The

week after Tom's death, Agnes was told there was less than $40 million and virtually nothing belonged to her. Only the Carvels are denied benefit of the bounty from the Carvels' life's work. Over $200 million "disappeared".

There exists in New York Surrogate's Courts a pattern of depriving Constitutional rights to divert estate assets. Improper accounting practices deny income to beneficiaries, evade taxes, and deny widows all income mandatory under the Marital and QTIP deductions. Since 1990, Agnes Carvel never received one penny of income from Tom's estate, nor has one penny of income due Agnes been paid over to Pamela Carvel as executor. Agnes was denied all asset- ownership in her lifetime. Five years after Agnes' death, Pamela Carvel (as Tom's executor) proved that perjury by lawyer-fiduciaries denied Agnes all asset control. By that time, it was a hollow victory because all assets were gone or diverted to the fraudsters who victimized Agnes.

The identity of the "Thomas and Agnes Carvel Foundation" and other Carvel charities was stolen by forgery by a group of Westchester County New York politicos and their cronies who own Hudson Valley Bank ("intervenors" in District Court).

The intention for eight years of stone-walling Agnes Carvel as sole lifetime beneficiary of Thomas Carvel, and nine years of stone-walling Pamela Carvel as Agnes' executor is a criminal conspiracy to defraud, expressly stated by the New York foundation usurpers ("intervenors" in District Court) in a February 18, 1992 "Confidential" manifesto of control: removing the foundation usurpers "**provides family with opportunity to assume control of**

Foundation, Estate and Agnes' assets." Nothing could more clearly demonstrate the intent to defraud Agnes Carvel of her assets in her lifetime and defraud the Carvels' legitimate charitable intentions for their estates.

That memo was written in the midst of New York State Attorney General Abram's investigations and prosecution of the usurpers for charity and tax fraud. That investigation eventually in 1996 resulted in the forced ouster of two foundation usurpers but not before the usurpers implemented their manifesto to prevent Carvel control of ALL Carvel assets, and not before many millions disappeared from charitable purposes.

Agnes and Pamela are the only whistleblowers assisting law enforcement in the theft of over $250 million of Carvel assets since 1989. Pamela Carvel is the only fiduciary, other than Agnes Carvel, to be denied indemnification of legal fees from Carvel assets. Agnes Carvel's adversaries (proven by the New York Attorney General to be involved with felons in criminal activities diverting millions of Carvel assets) draw down and fraudulently transfer Carvel assets without court order, without scrutiny, without limit, and without notice to the Estate, beneficiaries or creditors.

Trustees subject to New York jurisdiction hold over $7-30 million of Agnes' assets. Over $15 million in assets are held in trust subject to return to the estate pursuant to *SCPA* 2215(3). Ancillary administrator Leonard Ross disbursed about $300,000 Estate assets without court approval and without notice to the Estate, its beneficiaries or its creditors. Agnes assets located in Tennessee were

also diverted by Ross and withheld without notice to the Estate and without legal authority. Ross has sureties of about $13 million. The absence of Surrogate's Court control over Agnes' estate and trust assets and disbursements by these other fiduciaries demonstrates that the Estate's property is not within the possession or control of the state probate court.

Agnes Carvel was a naturalized U.S. citizen who did not revoke her British citizenship by birth. Agnes returned to Great Britain from Florida to preserve her health, life, liberty and personal sovereignty from incessant attacks and extortion by Westchester Surrogates Court and the fraudsters who stole over $250 million in Carvel assets. Despite Agnes' doctor's dire warnings, the fraudsters' tactics became more aggressive, cutting off all means of support, until they did indeed procure Agnes' in London in 1998.

Since 1998, professionals in England told Pamela that the executor's right to reimbursement for sums advanced on the Estate's behalf is "written in stone". The professionals also said that there existed no procedure and no precedent for compelling the delivery of Estate assets located in the U.S.

Pamela sought direction from the High Court on how to assert the Estate's claims for reimbursement to the executor so that litigation to recover Agnes Carvel's stolen assets could continue in Delaware and Florida. The High Court's Master framed the procedure resulting the judgment, based on complete itemization of expenses. The Carvel Foundation (a Florida not-for-profit corporation) as remainder beneficiary was named to represent the Estate. The High Court received copies of all Carvel Foundation

documents indicating that Agnes, Linda and Pamela Carvel were the first directors. The Master also knew that Pamela Carvel resign prior to seeking the High Court direction.

New York Nassau County Supreme Court Judge McCarthy voiced the opinion that domestication of the foreign judgment was a matter for federal court when the judgment was asserted against New York banks holding Agnes' property. The case was allegedly transferred to Westchester Surrogate's Court where it disappeared. Surrogate's Court never acknowledge the Nassau County proceeding despite several requests by Pamela Carvel, petitioner and claimant.

This application based on Constitutional questions, deals only with the probate exception to subject matter jurisdiction asserted by the lowers courts. Continuing events in the Estate remain on-going subjects of criminal investigations against the foundation usurpers ("intervenors"), as do Pamela Carvel's efforts, and appeals, on a *pro se* basis against the multi-million dollar litigation machine funded by the Carvels' restricted charitable gifts. Misrepresentations of substantive facts by the foundation usurpers, even when erroneously adopted by the courts, are not directly related to the "probate exception" and are not address herein.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Writ of Certiorari is requested because the United States Court of Appeals decided an important question of federal law by fitting new circumstances into the already worn-out "probate exception" mould.

This case presents important new questions about the "probate exception" that remain unresolved by *Marshall* that should be settled by this Court.

The important questions concerns federal jurisdiction over international creditor claims, and the violation of substantive, material, guaranteed Constitutional rights if the "probate exception" to federal jurisdiction is allowed to elevate the limited jurisdiction and limited domestic interests of state probate courts over the guarantees of the First, Fifth, and Fourteenth Amendments to the U.S. Constitution and other U.S. laws; even when no probate proceeding exists in any U.S. state, and even after the state probate court already denied jurisdiction over the foreign estate's foreign obligations, and denied standing to the foreign executor.

Citizens of an aspiring democratic society depend on the power of the courts to provide the same equal treatment for all, and to allow due process through the courts to redress of grievances, even grievances with the court system. The "probate exception" denies these rights to litigants by elevating a small division of state courts and a small body of state laws over the superior guarantees provide to citizens by the U.S. Constitution and U.S. laws.

There are not yet estate whistleblower laws to protect those who refuse to accept the abuses of the probate court system. The "probate exception" can be used to deny the appropriate avenue in federal courts to redress Constitutional violations by the state probate courts in estate matters (that fall short of RICO and civil rights statutes).

At a time when money-laundering is a prime security concern for the nation, the importance of federal jurisdiction has exceptional urgency (particularly in New York) because of the increasing discoveries that political corruption in the state probate system, and patronage to corrupt lawyer-administrators, are resulting in the fraudulent election of the marital deduction, income tax fraud, and other frauds decimating multi-millions of dollars of estate assets without explanation, without accountability, without notice to, or payment to, widows and named beneficiaries.

I THE DECISIONS BELOW CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS

Marshall v. Marshall, 126 S. Ct. 1735 (2006) is instructive, although it does not directly apply to this Carvel case because the *Marshall* matters were already in the federal bankruptcy court, and an actual probate in a state court existed.

In this Carvel case, state laws apparently can oppress constitutionally guaranteed rights of a U.S. citizen as foreign executor-creditor even though:

i) there is no probate proceeding in any state court;

ii) New York Surrogate's Court repeatedly declined jurisdiction over the Estate's foreign claims;

iii) New York Surrogate's Court denied standing to the foreign fiduciary.

There exists no probate jurisdiction belonging exclusively to the Surrogate's Court for the District Court improperly to usurp. *Moser v. Pollin, 294 F.23d 335, 340 (2d Cir. 2002).*

In New York, the Surrogate's Courts share concurrent subject matter jurisdiction with the state's court of general jurisdiction, the Supreme Court. *N.Y. Const. art. VI, s. 7, 12; Pollicina v. Misericordia Hosp. Med. Ctr., 82 N.Y.2d 332, 339, 624 N.E.2d 974, 977, 604 N.Y.S.2d 879 (1993); In re Estate of Malloy, 278 N.Y. 429, 432, 17 N.E.2d 108, 109 (1938); see also Dulce, 233 F.3d at 147* (recognizing holding of *In re Estate of Malloy*).

As a practical matter, "it is the policy of the New York courts to concentrate in the hands of the Surrogate all matters affecting the administration of estates," *Beach v. Rome Trust Co., 269 F.2d 367, 372 (2d Cir. 1959)*, "the mere internal arrangement of the state courts" -- even if it results "in the effectively exclusive jurisdiction of the 'probate' court" over certain causes of action -- is "irrelevant to the existence of power [by the federal courts] to hear the cause." *Id. at 373; see also Celentano v. Furer, 602 F. Supp. 777, 780 (S.D.N.Y. 1985)* ("[A] policy engaged in by judges of deferring to another court possessed of concurrent jurisdiction cannot vitiate the Constitutional grant of jurisdiction to the State Supreme Court."). *Moser v. Pollin, 294 F.23d 335, 340 (2d Cir. 2002).*

"With respect to the plaintiff's application for a declaration of his "right to share in the estate," we believe this somewhat ambiguous demand could properly be construed to seek relief that would not be barred by the probate exception." "A simple declaration that the plaintiff is a judgment creditor of the estate and in that sense entitled to share in the estate in the event it has assets eligible to satisfy his judgment would have no capacity to interfere

with the state probate court's administration of the estate or discharge of its duties. See *13B Wright & Miller §3610, at 493* ("It is generally not considered an interference with state proceedings for a federal court to declare whether a party has the right to share in an estate." *Dulce v. Dulce, 233 F.3d 143, 145 (2d Cir. 2000).*

Where a state law, statutory or customary, gives to the citizens of the state, in an action or suit inter partes, the right to question at law the probate of a will or to assail probate in a suit in equity, the courts of the United States, in administering the rights of citizens of other states or aliens, will enforce such remedies. *O'Callaghan v O'Brien (Farrell v O'Brien) 199 US 89, 25 S Ct 727, 50 L Ed 101*

Circuit courts of the United States have jurisdiction over matters of administration and probate, and are bound to exercise it, if the bill, according to received principles of equity, states a case for equitable relief. *Payne v Hook, 7 Wall 425, 19 L Ed 260.*

The circuit court of the United States has general equity jurisdiction to administer, as between citizens of different states, the assets of a deceased person within its jurisdiction. *Lawrence v Nelson, 143 US 215, 12 S Ct 440, 36 L Ed 130.*

The chancery jurisdiction of the federal courts embraces a suit, where the requisite diversity of citizenship exists, to have the complainants adjudicated to be the heirs at law and next of kin of a decedent. *McClellan v Carland, 217 US 268, 30 S Ct 501, 54 L Ed 762.*

The questions relating to the interest of heirs, devisees, or legatees, or trusts affecting such interests, which may be determined without interfering with probate or assuming general administration, are within the jurisdiction of the federal courts where diversity of citizenship exists and the requisite amount is in controversy. *Sutton v English, 246 US 199, 38 S Ct 254, 62 L Ed 664.*

Where a state, by statute or custom, gives to parties interested the right to bring an action or suit inter partes, either at law or in equity, to annul a will or to set aside probate, the courts of the United States, where diversity of citizenship and a sufficient amount in controversy appear, can enforce the same remedy; but this rule relates only to independent suits, and not to procedure merely incidental or ancillary to the probate. *Sutton v English, 246 US 199, 38 S Ct 254, 62 L Ed 664.*

Federal District Court has jurisdiction in diversity of citizenship action seeking to impose personal liability on executor or administrator for wrongful conduct in administering decedent's estate. *12 ALR Fed 292.*

A circuit court has jurisdiction of a bill against an administrator and his sureties on his official bond, to obtain a share of the estate. *Payne v Hook, 7 Wall 425, 19 L Ed 260*

Where the original debtor died insolvent, and his surety died insolvent, and a portion of the assets belonging to the estate of the latter is in the hands of the surety of his administrator, and a discovery of the assets in hand and their application to the payment of the debt are required, the circuit court is

authorized to entertain the suit. *Kendall v Creighton (Green v Creighton) 23 How 90, 16 L Ed 419*

II THE "PROBATE EXCEPTION" CONTAINS SELF-CONTRADICTORY PARAMETERS

In *Marshall,* this Court observed that the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction. *Marshall at 1748.*

In this Carvel case, lower courts cited that the probate exception "precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court." This statement alone leaves two ambiguous concepts: "dispose of" and "custody".

"Even prior to the decision in *Marshall,* commentators recognized that "[i]t generally is not considered an interference with state proceedings for a federal court to declare whether a party has the right to share in an estate . . . [and] federal courts will entertain suits by claimants to establish a right to a distributive share of an estate." *See* 13B Charles A. Wright, Arthur R. Miller, and Edward H. Cooper, *federal Practice and Procedure* § 3610 (3rd ed. 1998)." *Harris v Onyx, U.S. Dis. Ct. So. W. Va. Civ. 2:05-0816, 2007 U.S. Dist. LEXIS 32052*

"Moreover, at least one circuit court of appeals has found the probate exception to federal

jurisdiction to be inapplicable where the assets at issue were in the control of the defendants rather than the probate court. *Glickstein v. Sun Bank/Miami, N.A., 922 F.2d 666, 673 (11th Cir. 1991)." Harris v Onyx, U.S.Dis.Ct. So.W.Va. Civ. 2:05-0816, 2007 U.S. Dist. LEXIS 32052.*

If estate assets are paid out (or "disposed of") by favored domestic administrators, beneficiaries, or trustees without court order, without notice to the Estate's beneficiaries or creditors, and without scrutiny by the foreign executor, does the probate court really have "custody" of the estate's assets?

If the estate assets are stolen, or illegal drawn from other states, held in trust, or sureties of the ancillary administrator, are the assets still in the "custody' of state probate court and still subject to the probate exception?

Favored fiduciaries and beneficiaries draw down (or "dispose of") estate assets without limit, without court order, and without accountability in state probate court, but whistle-blowing fiduciaries and beneficiaries (and usually the elder widow) are denied equal access to the same indemnification of expenses. Is this unequal treatment and deprivation of property and rights ignored and permitted by federal law because the state probate court is deemed to have "custody" of the estate's property?

This Court and other federal courts held that it is within the jurisdiction of the federal courts to determine the rights of parties to a share of the estate, and that such determination is binding on the state probate court. It is self-contradict to retain the concept in the "probate exception" that District

Court: i) may determine a right to claim an interest in the estate; ii) can rendered a decision enforceable in the state probate court; iii) but at the same time District Court may thwart seeking such relief by invoking the "probate exception" to deny subject matter jurisdiction in District Court.

There is a double standard of redress, equality, and due process in state probate courts unless all courts are compelled to acknowledge the supremacy of the federal laws, even in estate matters. Because of the superior position to state law of the U.S. Constitution that guarantees equal treatment that property will not be taken without due process, District Courts should retain full power over estate property and claims; or at least retain jurisdiction to confirm or determine a foreign claim, even if District Court still declines compelling payment. However, without authority to compel payment, even a federal judgment may languish for decades in state probate court without recourse, awaiting state probate court "administration" because of the probate exception.

Turton v. Turton, 644 F.2d 344, 346-47 (5th Cir. 1981) distinguished the permissible action of a federal court in issuing a declaratory judgment as to the right to a percent of the net estate from the impermissible action of that same court in determining the dollar amount of the net estate.

A creditor can obtain a federal judgment that he has a valid claim for a given amount against the estate, and that the judgment can be asserted as res judicata in the state probate court proceedings. *Turton, 644 F.2d at 344, 347.*

In *Phelps v. McDonald, 99 U.S. 298, 308*, Mr. Justice Swayne uses this language:

> "Where the necessary parties are before a court of equity, it is immaterial that the res of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the lex loci rei sitae, which he could do voluntarily, to give full effect to the decree against him. Without regard to the situation of the subject matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*." *Cole v. Cunningham, 133 U.S. 107;10 S. Ct. 269;33 L. Ed. 538;1890 U.S.*

The fact that federal courts of equity have no probate jurisdiction does not preclude them from entertaining suits in favor of heirs, legatees, and other claimants against a decedent's estate to establish their claims, so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of a state court. *Markham v Allen, 326 US 490, 66 S Ct 296, 90 L Ed 256.*

Neither the principle of convenience nor the statutes of a state can deprive United States courts of jurisdiction to hear and determine a controversy between citizens of different states, when such a controversy is distinctly presented, because the judgment may affect the administration or distribution in another forum of the assets of

decedent's estate. *Hess v Reynolds, 113 US 73, 5 S Ct 377, 28 L Ed 927.*

The limited application of the probate exception also ensures that where exercise of federal jurisdiction will result in a judgment that does not dispose of property in the custody of a state probate court, even though the judgment may be intertwined with and binding on those state proceedings, the federal courts retain their jurisdiction. *Lefkowitz v. Bank of N.Y., __F.3d __, 2007 WL 1839756, at *2-*3 (2d Cir. June 28, 2007 (04-0435-cv).*

A federal court properly "exercise[s] its jurisdiction to adjudicate rights in [property in the custody of a state court] where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court." *Marshall, 126 S.Ct. at 1747 (citing Markham, 326 U.S. at 494)* (internal quotation marks omitted).

A creditor is not compelled to resort to the probate court to establish his debt against a decedent but may obtain judgment in any court of competent jurisdiction, and then remit the judgment to the probate court for classification. *Yonley v Lavender, 21 Wall 276, 22 L Ed 536*

Federal courts have no probate jurisdiction and cannot undertake the administration of estates, but they may, under proper circumstances, hear and adjudge controversies between third parties and executors or administrators. *Yonley v Lavender, 21 Wall 276, 22 L Ed 536.*

The lower courts generally agree that creditors, legatees, heirs, and other claimants may establish their claims against the estate in federal court, with the caveat that the claims so established—whether by way of a declaratory judgment in the case of a legatee or heir establishing his or her right to a share of the estate, or in an actual suit on the merits in the case of a creditor—must then take their place and share in the estate as provided for in the probate court proceedings. *E.g., Michigan Tech. Fund v. Century Nat'l Bank, 680 F.2d 736, 740 (11th Cir. 1982)* (holding that it is permissible for a federal court to adjudicate a breach of agreement to make a mutual will because it is akin to a creditor suing for breach of contract).

"Jurisdiction of the [federal] court to ascertain and declare the interest of the plaintiff in the estate . . . is clearly established by a long line of cases" *McClendon v. Straub, 193 F.2d 596, 598 (5th Cir. 1952).*

Federal courts can hear controverted questions of debt or no debt as against the estate *Odom v. Travelers Ins. Co., 174 F. Supp. 426, 434 (W.D. Ark. 1959).*

Federal courts can entertain suits to establish claims against the estate, but those claims must stand in line. *Galion Iron Works & Mfg.Co., 167 F. Supp. at 309–10.*

If the plaintiff acknowledges the validity of the will and merely asserts a right to share in the distribution of the estate (either as a matter of interpretation of the will or in reliance on some state law forced-share provision), the federal court is free

to adjudicate the claim. *Turja v. Turja, 118 F.3d 1006, 1009 (4th Cir. 1997).*

When examined in light of one of the principles animating diversity jurisdiction — protecting out-of-state litigants from the actual or perceived prejudice of state court judges, Justice Marshall observed: However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states. *See, e.g., Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809)* (Marshall, C.J.).

Judges who sit in some probate courts need not even be lawyers or have legal training. Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America: II*, 43 MICH. L. REV. 113, 138–40 (1944) [hereinafter Simes & Basye, *Probate Court II*].

Probate courts have a reputation for bias and corruption (and are the subject of criminal prosecutions in New York). *See* Charles Rembar, *The Law of the Land: The Evolution of our Legal System* 71 (1980) (noting that the New York probate courts have a history as "factories of corruption"); Ronald Chester, *Less Law, but More Justice?: Jury Trials and Mediation As Means of Resolving Will Contests*, 37 DUQ. L. REV. 173, 178–81 (1999) (documenting instances of bias); Jerry Goldman & Kenneth S.

Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93, 97–99 (1980)) (discussing bias concerns in diversity jurisdiction in general); *The Choice Between State and federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178 (1965)) (discussing studies indicating that 40–60 percent of litigants who file diversity cases in federal court cite fear of local bias as a motivating factor).

The probate exception is questionable even if it applied only to the actual state probate of a will, and not also to matters ancillary to probate. For "[i]f there is diversity of citizenship among the claimants to an estate, the possible bias that a state court might have in favor of citizens of its own state might frustrate the decedent's intentions; it is just such bias, of course, that the diversity jurisdiction of the federal courts was intended to counteract." *Dragan v. Miller, 679 F.2d (7th Cir. 1982).*

III. THERE CAN BE NO "PROBATE EXCEPTION" WHEN THERE IS NO STATE "PROBATE"

The ancillary administration is dependent on the existence of the domiciliary estate, where the only probate occurred under the laws of England. New York *SCPA 1601.* Agnes Carvel's Last Will probated in London has never been contested in any ancillary jurisdiction.

Under New York law, the state's probate court, "Surrogate's Court", does not have exclusive jurisdiction. *Moser v. Pollin, 294 F.23d at 341 (2d Cir. 2002).*

Moser points out, "the Surrogate's Courts share concurrent subject matter jurisdiction with the state's court of general jurisdiction, the Supreme Court... There thus exists no probate jurisdiction belonging exclusively to the Surrogate's Court for the District Court improperly to usurp." *Id.* (citing N.Y. Const. art. VI, §§7, 12). Therefore, federal jurisdiction is not barred on this basis. *See Lepard v. NBD Bank, 384 F.3d 232-237 (CA6 2004)*(stating that "[t]he standard for determining whether federal jurisdiction may be exercised is whether under state law the dispute would be cognizable only by the probate court").

Assets in New York banks belong to the one and only Estate in London. There is no "New York Estate" alluded to by the District Court (App. 5), merely an ancillary administration allegedly for protection of New York creditors – of which there are none. The very state court that denies the foreign fiduciary legal standing to act to recover estate assets, or to assert claims against estate assets, withholds those estate assets without substantive due process.

When the state probate court does not have jurisdiction over foreign beneficiaries and creditors, does not give them notice of New York proceedings, and denies standing to the foreign fiduciary, then, only federal jurisdiction is appropriate to redress grievances.

The ancillary administration could be said to be interfering with the domiciliary probate proceeding and efficient administration of the estate by denying estate assets to pay expenses incurred by the

executor and needed to recover estate assets in other jurisdictions.

When such obstruction of ALL funds needed to administer the Estate lasts for nine years, to the point of denying even professional legal representation at trial, it must be deemed intentional interference by the state probate court through the ancillary administration with the pre-existing rights of the Estate, foreign fiduciary, beneficiaries and creditors.

The first precedent proceeding is the foreign probate and administration, not the state ancillary administration for domestic claims.

Confirming or asserting foreign claims to Agnes Carvel Estate's U.S. property by the Estate's foreign fiduciary, beneficiaries, or creditors, does not require "general jurisdiction" of property in a state ancillary administration; however, the issue remains that the Estate's property belongs to the foreign Estate, not to the ancillary administrator.

The jurisdiction of the federal courts, "having existed from the beginning of the federal government, cannot be impaired by subsequent state legislation creating courts of probate." *McClellan v. Carland, 217 U.S. 268, 281, 30 S. Ct. 501, 54 L. Ed. 762. Durfee v. Duke, 375 U.S. 106, 84 S. Ct. 242, 11 L. Ed. 2d 186.* (upholding federal jurisdiction over action by heirs of decedent, who died intestate, to determine their rights in the estate (citing *Waterman, 215 U.S. 33, 30 S. Ct. 10, 54 L. Ed. 80*))." (*Marshall*).

IV. THERE IS NO "PROBATE EXCEPTION" WHEN STATE COURT PREVIOUSLY DECLINED JURISDICTION

"As a general principle, when one court is exercising in rem jurisdiction over a res, a second court will not assume in rem jurisdiction over the same res." (*Marshall*). The first court to assert jurisdiction over Agnes Carvel's Last Will, the Estate, and the parties, was the High Court of Justice for England and Wales.

Westchester Surrogate's Court did not exercise jurisdiction over the worldwide parties or claims of the Estate in London and its ancillary administrations in Delaware and Florida. On June 30, 2003, the Surrogate denied jurisdiction to settle all domestic and foreign claims. On December 4, 2003, the Surrogate denied Pamela Carvel standing to recover estate property. On June 30, 2004, the Surrogate alleged that New York's *Surrogate's Court Procedure Act* does not protect Delaware ancillary administration claims. Also, the substance of the High Court judgment was not included in Ross' "Final Accounting" in Surrogate's Court. The Surrogate supported Ross' refusal to amend his accounting.

New York ancillary administrator, lawyer Leonard Ross, refuses to reimburse Pamela Carvel as executor for legal fees paid to Estate lawyers on his behalf. Ross refused to act on the Estate's behalf to seek reimbursement in New York for any Estate expenses that are not his own.

Ross and Estate lawyer Eve Markewich entered into stipulations with the Estate's adversaries to pay

$3-4 million in fees to Ross and Markewich as long as they prohibited any funds from reaching Pamela Carvel or leaving New York.

Pamela Carvel attempted to demand payment in New York without Ross. On June 30, 2003, Westchester County New York Surrogate Scarpino denied jurisdiction over the foreign claims of Pamela Carvel as executor. Requests that the Surrogate "establish a procedure for the determination of all claims, domestic and foreign, against the [Agnes Carvel 1991] Trust are denied". Scarpino also quoted that it is "the law of New York that a foreign representative has no standing to sue or be sued (Leighton v. Roger, 300 N.Y. at 934)."

New York legal fees were approved to lawyer Frank Streng by this same decision. No other expenses were paid or reimbursed, including Agnes Carvel's funeral expenses. It was later discovered that Surrogate Scarpino and Streng concealed that Streng worked for the Surrogate as an advisor. (It was also concealed that Surrogate Scarpino received over $300,000 "loans" from the "intervenors" herein). Although the Surrogate alleged in his decision to take jurisdiction over New York expenses, he never approved any other payment of legal fees for any attorney to represent Pamela Carvel as Agnes' executor.

On June 6, 2005 Ross as New York ancillary administrator filed a "final accounting" although all Estate proceedings had not concluded. No New York creditors were listed. Streng refused the Estate's demand to oppose Ross' accounting, although Ross excluded all legacies, taxes, funeral expenses, debts and administrative expenses of the Estate in order to

give the appearance for the court that no funds needed to leave New York. Surrogate Scarpino allowed Streng to withdraw as lawyer for Pamela days before objections to the accounting were due. Without funds, Pamela Carvel was compelled to proceed *pro se.* Pamela Carvel is a member of the Association of Certified Fraud Examiners, but has no training in law. The intended detriment to the Estate by lack of professional representation became obvious.

On December 4, 2003 Surrogate Scarpino denied Pamela Carvel the right to appear in Westchester Surrogate's Court, stating, "the movant lacks standing in her capacity as the foreign fiduciary of Agnes' estate to maintain an action in the court for the recovery of property on behalf of the decedent (see, Leighton v Roper, 300 NY 434)."

On June 30, 2004, Surrogate Scarpino denied estate funds to Pamela Carvel as Delaware ancillary administrator, after returning a corporate matter to be litigated in Delaware that languished in Westchester Surrogate's Court for 9 years because of perjury by the foundation usurpers' general counsel. The Surrogate stated, "Surrogate's Court Procedure Act makes no provision for satisfying non-New York administration expenses out of a New York ancillary estate."

On December 29, 2005, Ross sought a restraining order to prevent the recovery of any assets by the Estate's executor – in line with his covert stipulation with the Estate's adversaries in exchange for over $3-4 million. After seven years of denying Pamela Carvel legal standing to recover Estate property or pay Estate expenses through Westchester, the same

Surrogate alleged to assert jurisdiction over the fiduciary to whom he denied legal standing, in order to prevent claims from being brought before any other court.

State probate court first denied access to any redress, then denied property without due process. Pamela Carvel asserted, in opposition, that a state probate court could not deny Constitutionally guaranteed rights to redress, equal treatment, and due process. Pamela was ignored. The Surrogate refused to render a decision that could be appealed.

After the Surrogate's Court clearly and repeatedly denied jurisdiction over all foreign claims, there can be no "probate exception" in federal court without breach of Constitutional rights for redress, due process, and equal treatment for foreign creditors as that given New York creditors. If the District Court is permitted to deny jurisdiction on the foreign claims by the foreign Estate, *even after* the state probate court refused jurisdiction, then there is no court available to a foreign fiduciary and a foreign creditor. Justice is denied.

V. "PROBATE EXCEPTION" PERPETUATES INJUSTICE THAT VIOLATES GUARANTEED, SUBSTANTIVE, MATERIAL RIGHTS

i. REDRESS OF GRIEVANCES (1ST AMENDMENT)

Redress of grievances, in any accurate meaning of these words, comprehends demands for an exercise by the Government of its powers in furtherance of the interest and prosperity of the petitioners and of their views on politically contentious matters.

Eastern R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961).

New York statute provides that nothing prevents a claimant from "commencing an action on his claim at law or in equity". The statute does not specify any restriction as to court or jurisdiction. *SCPA* s.1810.

New York Surrogate's Courts do not have exclusive jurisdiction. *N.Y. Const.* art. VI, §7, §12.

New York statutes provide that "any court of this state having jurisdiction" has the power to direct the distributions of assets by the ancillary administrator. *SCPA* s.1610(2),(3).

It must be considered, then, that foreclosure of all access to the courts, at least through financial barriers and perhaps through other means as well, is subject to federal constitutional scrutiny and must be justified by reference to a state interest of suitable importance in order to ignore U.S. Constitutional rights.

The shell game of rejecting and accepting jurisdiction over foreign obligations is design to wear down and bankrupt the foreign executor, so that adversaries can prevail by default. Denying redress of grievances because the foreign executor i) has not standing in state probate court; ii) cannot fund professional prosecution because of the obstructions of state probate court; or iii) is ineffective as a *litigant in person* against professionals paid multi-millions from estate assets, leads to substantive material violations of equal treatment and due process.

ii. EQUAL TREATMENT (14th AMENDMENT)

The Fourteenth Amendment to the U.S. Constitution states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The probate exception has the effect of permitting state procedures or laws to override and abridge these rights of a foreign fiduciary, whether or not that fiduciary is a citizen of the United States. Presumably no one would argue that non-resident U.S. citizens or foreign citizens appearing in U.S. courts are denied this same protection.

Property held by an ancillary administration of the foreign Estate belongs to the foreign Estate, despite being located in the U.S. The probate exception seeks to deprive the Estate of recovery of its property without due process. The deceased was domiciled in a foreign land where the actual probate proceeding exists. It is that foreign probate court that has sole jurisdiction over the probate proceeding and any determinations regarding the validity of the Last Will, not any U.S. state probate court. Agnes Carvel's Last Will remains uncontested by all parties in all jurisdictions.

By denying the foreign fiduciary all remedies to assert claims against the Estate's U.S. assets, marshaled in a state ancillary administration, amounts to permitting a state law to eradicate the

equal protection for the foreign fiduciaries and creditors as that shown to state domestic fiduciaries and creditors (whether or not a person is also a U.S. citizen).

An ancillary administration is just that, "ancillary". It is not a probate proceeding. It does not eclipse the original Estate administration. Under New York law, the ancillary administration is supposed to take into consideration the worldwide debts and expenses of the Estate. Domestic creditors are not given preference. Payments are reduced on a prorated basis if all debts domestic and foreign exceed the Estate's assets. *SCPA 1610(2).* This demonstrates that there is intended equality between all creditors both domestic and foreign, but that is not the reality of practice.

New York statute provides that assets prematurely distributed must be return if in excess of the amount of entitlement. *SCPA* 2215(3). This demonstrates that not all estate assets are within the custody or control of the state probate court.

All property of the decedent is subject to payment of all claims, both foreign and domestic. Remainder interests abate second if funds are insufficient to pay the statutory priority of payments. *EPTL* 13-1.3. If the assets are insufficient, payment to domestic creditors in prorated. *SCPA* 1610(2). If foreign creditors are denied standing in both state and federal courts, their rights to equal payment as domestic creditors, and their standing for payment superior to remainder interests, is also denied. Domestic creditors would unfairly receive assets rightfully due others by manipulation of standing in courts. Such reality denies the foreign fiduciary-

creditor equal treatment. This reality deprives the fiduciary-creditor of property without substantive due process.

If the ancillary administrator fails and refuses to protect the overall estate; if the foreign fiduciary is denied standing in the state probate court to demand payment; and if the state probate court denied legal responsibility to consider foreign expenses, then the foreign estate, foreign executor and foreign creditor (even if they are U.S. Citizens) are deprived of equal treatment as the domestic ancillary administration.

iii. DUE PROCESS (5TH & 14TH AMENDMENTS)

In this Carvel case, the "intervenors" argued that the foreign executor lacked standing in the state probate court (or in any New York court) and at the same time used that argument to demand dismissal by "probate exception" in favor of the state courts where legal standing had already been denied because the claimant was a foreign executor. This dichotomy basically puts the bank in the hands of the bank robbers, and fires the security guards.

The "probate exception" seeks to elevate primitive procedural formulas of the state probate court over the substantive rights to due process guaranteed by U.S. law. Depriving a person of property in her lifetime, depriving her estate of that same property after her death, violates prohibition against taking property without due process.

When alleged remainder interests are allowed by state probate courts to deprive the principal beneficiary of all benefit for as long as she lived, then state probate procedure is made superior to the

federal mandate for equal treatment, and preservation of life, liberty and property by due process.

Such violation is deadly, and apparently intended to procure death when the prime beneficiary is elderly and fear results when needed money is withheld; or when the prime beneficiary is ill and depends on the distributions for medical treatments to live.

Due process is violated if a practice or rule "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934).

It is the federal courts unqualified discretion to decide what substantive rights are protected under due process and how extensive that protection is. Once the federal courts decide what substantive rights are protected by substantive due process, the Court enforces these rights by reviewing state legislation for compliance with these rights.

The probate exception short-circuits this essential procedure of the federal system, for the protections of rights, in favor of the primitive state probate courts known for bias, corruption, and discrimination, where justice remains more of a trial by ordeal than judicial logic.

The Court also used the theory of Substantive Due Process to apply ("incorporate") many of the *substantive* provisions of the Bill of Rights (like the First Amendment) to the states as well. *E.g. Gitlow v. NewYork,* 268 U.S. 652 (1925).

Pamela Carvel, fiduciary for Agnes Carvel (once a millionaire) and executor of Agnes' multi-million dollar estate, is compelled to represent the Estate's significant claims *pro se* for lack of funds. The design is to enforce extreme economic hardships on the Carvels to prevent the recovery of stolen Carvels assets and charities, and to punish for successful cooperation with law enforcement.

That the probate exception could be used to deny redress of grievances creates a furtherance of these crimes -- in effect providing the state probate court with a blank check to write against all assets of any deceased person, without recourse to Constitutional rights, simply because a probate court is involved.

CONCLUSION

The "probate exception" should not apply where there is no probate proceeding in any U.S. state court, and where the state probate court has already denied jurisdiction over foreign obligations and denied standing to the foreign executor-creditor.

State law cannot be elevated by the probate exception to deny rights to redress, equal treatment, and due process.

Agnes and Pamela Carvel are the only fiduciaries in Carvel matters who are denied equal indemnification of legal fees and administration expenses by Westchester Surrogate's Court because the Carvels are also the only "whistleblowers" concerning criminal activities, including the apparent bribery of the Westchester Surrogate by the "intervenors", and fraudulent transfer of Carvel property; and the Carvels are the only fiduciaries to

assist law enforcement's success in felony convictions.

Being compelled to act as *litigant in person* for lack of funds is not a legal argument; however, it is well known that in the English-based justice system, the more money, the more justice that is available. It is also true that a "professional" is given full credibility and can induce a court to accept misrepresentations of facts despite a *pro se* litigant's evidence to the contrary. Denying a foreign fiduciary reimbursement for legal representation amounts to denying an estate equal justice.

Nevertheless, our citizens hold dear the concept that the adamant citizen advocates, who refused to accept injustice, added laws to our Constitution in the last 100 years that now ensure equal rights, equal access, and prohibit discrimination based on gender, age, physical ability, race, and religion.

There is by no means an expedient remedy to injustice. Only by adherence to our history of persistence by devoted citizens can we create a legacy of greater justice for future generations. It can never be forgotten that once many horrible injustices were "legal".

There is an ever-increasing importance for federal jurisdiction to prevent fundamental guaranteed rights from being jettisoned by the "probate exception". This Court has often narrowed the "probate exception". Perhaps the time has come to eliminate it altogether.

The "probate exception" is just one more hindrance to equal justice. This Writ of Certiorari should be granted to remove this hindrance.

Respectfully submitted,

Pamela Carvel, appearing *pro se* for lack of funds
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06 - 2083
Carvel v. Carvel Foundation Inc.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this court's Local Rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)." A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party not represented by counsel unless the summary order is available in an electronic database which is publicly accessible without payment of a fee (such as the database available at http://www.ca2.uscourts.gov/). If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 1st day of August, Two thousand seven.

PRESENT:
JOSE A. CABRANES
REENA RAGGI
Circuit Judges

UNITED STATES COURT OF APPEALS FILED
AUG – 1 2007
Catherine O'Hagan Wolfe, Clerk

EDWARD R. KORMAN
*District Judge**

SECOND CIRCUIT

*The Honorable Edward R. Korman, judge of the United States District Court of the Eastern District of New York, sitting by designation.

PAMELA CARVEL, as Executor of the Estate of AGNES CARVEL,
Plaintiff-Appellant,

-V.-

No. 06-2083-cv

CARVEL FOUNDATION INC., a Company incorporated under the laws of the State of Florida,
Defendant,

THOMAS AND AGNES CARVEL FOUNDATION, Ancillary Administrator LEONARD M. Ross,
Intervenors.

APPEARING FOR APPELLANT:
PAMELA CARVEL, London, England, *pro se.*

APPEARING FOR APPELLEES:
STEVEN J. FINK (James J. Capra, Jr., *on the brief,* Lisa T. Simpson, Alison F. Swap, of *counsel,* Orrick Herrington & Sutcliffe LLP, New York, NY, *for Intervenor Thomas and Agnes Carvel Foundation.*

LAWRENCE M. ROSENSTOCK, Markewich & Rosenstock LLP, New York, NY, *for Intervenor Leonard M. Ross.*

Appeal from a judgment of the United States District Court for the Eastern District of New York (Dora L. Irizarry, *Judge).*

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Plaintiff Pamela Carvel appeals *pro se* from a judgment of the District Court dismissing her action to confirm a foreign country money judgment against the Estate of Agnes Carve] (the "Estate"). The District Court concluded that the probate exception to federal jurisdiction deprived the District Court of subject matter jurisdiction to hear the action. We assume the parties' familiarity with the facts, the issues on appeal and the procedural history.

Having carefully reviewed all of plaintiff's arguments, we agree with the District Court that, pursuant to the probate exception, it lacked subject matter jurisdiction to hear plaintiff's action. The Supreme Court's recent decision in *Marshall v. Marshall, 126* S. Ct. 1735 (2006), which clarified the scope of the probate exception, does not change the result. *Marsball* explained that "the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court." *Id.* at 1748; *see also Lefkowitz v. Bank of N. Y.* _ F.3d _, 2007 WL

1839756, at *12-*13 (2d Cir. June 28, 2007) (describing history of probate exception and scope of probate exception after *Marsball.* Here, plaintiff's action would interfere with a complex pending proceeding in New York Surrogate's Court concerning the assets and property of the Estate. Because plaintiff's action "endeavors to dispose of property that is in the custody of a state probate court," *Marsball,* 126 S. Ct. at 1748, the probate exception bars her from maintaining this action in federal court.

We have considered all of plaintiff's arguments on appeal and find them to be without merit. Accordingly, we hereby AFFIRM the judgment of the District Court.

FOR THE COURT,Catherine O'Hagan Wolfe,
Clerk of Court By /s/ Lucille Carr

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
PAMELA CARVEL, as Executor of
the Estate of Agnes Carvel. *pro se*
Plaintiff, MEMORANDUM
-against- & ORDER
06-MC-0005(DLI)
CARVEL FOUNDATION INC.
Defendant.
----------X

DORA L. IRIZARRY, U.S. District Judge:

On January 20, 2006, *pro se* plaintiff Pamela Carvel, as Executor of the Estate of Agnes Carvel, moved to confirm a foreign country money judgment against the Estate of Agnes Carvel. The Thomas and Agnes Carvel Foundation (the "T&A Foundation") and Leonard M. Ross ("Ross"), the Ancillary Administrator c.t.a. of the Estate of Agnes Carvel, (collectively the "Intervenors") oppose plaintiff's motion and cross-move to dismiss this proceeding. On February 10, 2006, the court ordered the plaintiff to show cause as to why (1) the T&A Foundation and Ross should not be granted leave to intervene and (2) this matter should not be dismissed for lack of subject matter jurisdiction. Based on a hearing held on March 9, 2006 and for the following reasons, this matter is dismissed for lack of subject matter jurisdiction.

Pro se plaintiff, as executrix of the estate of Agnes Carvel, seeks to confirm a judgment by the High Court of Justice London, England (the "High Court"), ordering "that the sum of £8,085,095.51 be paid from the estate of the late Agnes Carvel" to the plaintiff (the "Foreign Judgment"). Plaintiff further moves

"against the assets primarily located in New York belonging to the debtor, the Estate of Agnes Carvel, towards satisfaction of the final judgment of the High Court . . . ."[1] (Pl's Mot. at ¶ 2.) In their opposition and cross-motion, the Intervenors argue that (1) plaintiff failed to allege a sufficient basis for diversity jurisdiction in her complaint; (2) the Court lacks subject matter jurisdiction over this action; and (3) plaintiff lacks standing to bring such an action.

In the instant case, diversity is the alleged basis for subject matter jurisdiction.[2] Diversity jurisdiction requires that the amount in controversy exceed $75,000 and the parties be completely diverse. 28 U.S.C. § 1332. Here, the Foreign Judgment exceeds the $75,000 amount in controversy required for diversity. Although the allegations concerning citizenship of both plaintiff and defendant are limited and vague, plaintiff asserts that she is the executrix of the Estate of Agnes Carvel, and thus a citizen of London, England. The defendant is a Florida not-for-profit corporation, and thus a Florida citizen for jurisdictional purposes. The court will assume that there is diversity jurisdiction for purposes of deciding this motion. However, irrespective of such an assumption and for the reasons set forth below, this court lack subject matter jurisdiction.

Pursuant to the probate exception to federal diversity jurisdiction, a federal court has no jurisdiction to probate a will or administer an estate even where diversity requirements are met.

[1] Although plaintiff brings this action against the Carvel Foundation, a Florida not-for-profit corporation, plaintiff's papers seek to enforce the Foreign Judgment against the New York Estate of Agnes Carvel. (*See* Pl's Mot. at ¶¶ 2, 6).

[2] Plaintiff failed to assert a specific basis for subject matter jurisdiction in her initial filing, but alleged diversity of

citizenship as a the basis for subject matter jurisdiction in her affirmation in response to the court's order to show cause. (Pl's Aff'm at ¶ 11.)

Because plaintiff is a *pro se* litigant, the court has construed plaintiff's papers broadly, interpreting them to raise the strongest arguments suggested. *Weixel v. Bd. of Educ. of the City of New York*, 287 F.3d 138, 146 (2d Cir. 2002). *SeeMarkham v. Allen*, 326 U.S. 490, 494, 66 S. Ct. 296, 298, 90 L. Ed. 256, 259 (1946); *Dulce v. Dulce*, 233 F.3d 143, 145 (2d Cir. 2000). Although federal courts sitting in equity have jurisdiction to entertain suits of creditors, legatees and heirs and other claimants against a decedent's estate," *Markham*, 326 U.S. at 494, 66 S. Ct. at 298, 90 L. Ed. at 259, they "may not exercise jurisdiction to adjudicate rights in such property where the final judgment" will "interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Id.*

A two-prong inquiry is necessary to determine whether the probate exception to federal diversity jurisdiction is implicated in a particular lawsuit. *Moser v. Pollin*, 294 F.23d 335, 340 (2d Cir. 2002). The first question is whether "the federal district court sitting in diversity [is] being asked to directly probate a will or administer an estate." *Id.* The second is "whether entertaining the action would cause the federal district court to interfere with the probate proceedings or assume general jurisdiction of the probate or control of property in the custody of the state court." *Id.* (internal quotations omitted). "An affirmative answer to either prong requires [] the case be dismissed for lack of subject matter jurisdiction." *Id.*

Here, while the first prong is not satisfied, the second prong is. The plaintiff seeks to domesticate and enforce the Foreign Judgment against the New York Estate of Agnes Carvel – not probate or administer the Estate of Agnes Carvel. (*See* Pl's Mot. at ¶¶ 2, 6). However, the exercise of jurisdiction would inevitably and impermissibly interfere with on-going probate proceedings concerning the Estate of Agnes Carvel. The instant dispute involves whether the Foreign Judgment should be domesticated and have full force and effect in the United States. Not only has this issue has been addressed, either directly or indirectly, by the Florida Circuit Court; the New York State Supreme Court, Nassau County; and the Westchester County Surrogate's Court (the "Surrogate's Court"), the Surrogate's Court has made various custodial and administrative determinations concerning the Estate of Agnes Carvel. Indeed, a trial on issues significantly affecting the New York Estate of Agnes Carvel is scheduled for May 2006 in the Surrogate's Court.

Since the death of Thomas Carvel ("Thomas"), the soft ice cream tycoon, in October 1990, various parties interested in his estate – including plaintiff, the T&A Foundation, and until her death in 1998, his widow Agnes Carvel ("Agnes") – have engaged in extensive, contentious litigation before the Surrogate's Court and elsewhere. In April 2002, the Surrogate's Court ruled that the T&A Foundation was the sole residual beneficiary of the Estate of Agnes Carvel. *In the Matter of the Application of the Thomas and Agnes Carvel Found.*, 8 Misc. 3d 1025 (Sur. Ct. Westchester Cty. 2002); *see also In re: Recognition of Foreign Judgment Pamela Carvel v. Estate of Agnes Carvel*, No. 05-5762, (Fla. Cir. Ct.

Jan. 31, 2006). The Surrogate's Court further found that a 1995 will executed by Agnes Carvel which named Defendant, the Carvel Foundation, Inc.,[3] the sole beneficiary of the estate, violated a reciprocal will agreement executed by Agnes and Thomas Carvel in 1988. *Id.*

On or about July 24, 2003, the High Court ordered the Carvel Foundation to represent the Estate. In January 2004, the High Court issued the Foreign Judgment requiring defendant Carvel Foundation to pay plaintiff £8,085,095.51. (Pl's Mot. at Ex. C.) On or about April 14, 2005, the plaintiff filed an action in a Florida Circuit Court attempting to domesticate the Foreign Judgment. *In re: Recognition of Foreign Judgment Pamela Carvel v. Estate of Agnes Carvel,* No. 05-5762. Initially, the Florida Circuit Court entered an Order and Final Judgment domesticating the Foreign Judgment. However, on or about January 31, 2006, the Florida Circuit Court vacated its order concluding that "there was strong evidence of a fraud upon the court perpetrated by [Pamela Carvel] in both the proceedings before the High Court and this Court." *In re: Recognition of Foreign Judgment Pamela Carvel v. Estate of Agnes Carvel,* No. 05-5762. Specifically, the High Court was unaware of plaintiff's status as a director of the Carvel Foundation, Inc., and that the Surrogate's Court found the T&A Foundation to be the sole residual beneficiary of the Estate. The T&A Foundation, an interested party, was not given notice of both the High Court and Florida proceedings. Furthermore, the Florida Circuit Court

[3] A Florida not-for-profit corporation incorporated on or about July 7, 1995.

found that Pamela Carvel did not make an argument that the decisions rendered by the Surrogate's Court was obtained by fraud. *Id.*

Here, plaintiff is attempting to commit the same fraud upon this court. Plaintiff failed to provide notice to the interested intervening parties of this motion to confirm the same Foreign Judgment submitted to the Florida Circuit Court. Plaintiff also failed to notify the court of her prior attempts to domesticate and enforce the Foreign Judgment. Moreover, plaintiff failed to reveal that she has pursued similar or identical remedies in the New York Supreme Court, Nassau County, and a Florida Court. Plaintiff also failed to make any argument that any decision by the Surrogate's Court concerning the Estate of Agnes Carvel was obtained by fraud.

Furthermore, as a result of plaintiff's numerous attempts to penetrate the New York Estate of Agnes Carvel through various state and federal courts and circumvent the Surrogate's Court's rulings, the Surrogate's Court issued a Temporary Restraining Order, which is still in effect, prohibiting plaintiff from: (1) taking any action in another court pertaining to or affecting the assets and property of the Estate [of Agnes Carvel], subject to the jurisdiction of this Court, including all assets and property of said Estate that are located in the State of New York, (b) taking any action to enforce the purported Judgment obtained by Pamela Carvel with regard to assets and property of the Estate [of Agnes Carvel], or (c) taking any action which interferes with Ross' possession, custody and control of the funds, assets or property of the Estate recovered by him or over which he has custody or control for the benefit of the Estate and/or (d) from representing to

any entity that she has legal authority to act on behalf of the Estate in the State of New York.

The New York State Supreme Court, Nassau County issued a similar TRO "stay[ing Pamela Carvel] from proceeding to enforce or take any action with respect to any judgment with regard to or pertaining to the assets or property of the Estate [of Agnes Carvel], or taking any other action or proceedings to seize or interfere with the assets of the Estate [of Agnes Carvel]. . .." and transferred the matter to the Surrogate's Court. Not only are there two restraining orders prohibiting plaintiff from bringing such an action, plaintiff failed to disclose such orders to the court.

Litigation concerning the Estate of Agnes Carvel has been on-going for nearly sixteen years before the Surrogate's Court. To date, the Surrogate's Court has (1) appointed Intervenor Leonard Ross as Ancillary Administrator c.t.a. of the New York Estate of Agnes Carvel; (2) exercised custody and control over the New York Estate of Agnes Carvel; (3) found the T&A Foundation to be the sole beneficiary of the residual Estate of Agnes Carvel; (4) held that a 1995 will executed by Agnes Carvel which named the Carvel Foundation, Inc. the sole beneficiary of the Estate violated a reciprocal will agreement executed by Agnes and Thomas Carvel; (5) issued restraining orders prohibiting plaintiff from seeking the exact relief she seeks before this court; and (6) issued other decisions affecting the distribution and administration of the Estate of Agnes Carvel. Additionally, a trial that may potentially resolve all issues concerning the New York Estate of Agnes Carvel is currently scheduled for May 2006 before the Surrogate's Court. Thus, any exercise of jurisdiction by this court would inevitably and

impermissibly interfere with the Surrogate Court's "probate proceedings," and custody and control over Agnes' New York Estate. *See Fay v. Fitzgerald*, 478 F.2d 181, 184 (2d Cir. 1973) (affirming dismissal of declaratory judgment action seeking declaration that common law wife of deceased is entitled to full state on grounds that state court would rule on such issues). Therefore, the probate exception applies and this matter is dismissed for lack of subject matter jurisdiction.

For the above reasons, the Intervenors' motion to dismiss is granted, and this case is accordingly dismissed in its entirety. The Clerk of Court is directed to close this case.

SO ORDERED.

DATED: Brooklyn, New York
March 29, 2006

/s/ DORA L. IRIZARRY

United States District Judge

FILED
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SUPREME COURT, U.S.

No. 07-917

IN THE

Supreme Court of the United States

PAMELA CARVEL, as Executor of the Estate of AGNES CARVEL,

Petitioner,

- against -

CARVEL FOUNDATION, INC., a Company Incorporated under the laws of the State of Florida,

Respondent.

THOMAS and AGNES CARVEL FOUNDATION, Ancillary Administrator LEONARD M. ROSS,

Intervenors.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTION

Respondent Leonard M. Ross, Ancillary Administrator c.t.a. of the Estate of Agnes Carvel, submits this Brief in Opposition to the Petition for Writ of Certiorari of Pamela Carvel ("Carvel").

Carvel, who styles herself "Executor of the Estate of Agnes Carvel," seeks review of a determination that the probate exception to diversity jurisdiction precludes federal court enforcement of a foreign judgment against the assets of a decedent's estate, when those assets are in the custody of a state court presiding over an estate administration proceeding.

Carvel has no standing to bring this petition, since she has been removed from her position as Executor. Further, the matter is moot since the foreign judgment has been vacated by the foreign court that issued it.

COUNTERSTATEMENT OF THE CASE

A. Facts Relating to Justiciability

This matter is based on Carvel's attempt to have the United States District Court for the Eastern District of New York "confirm" a foreign judgment ("Foreign Judgment").

Carvel, in her previous capacity as Executor of the Estate of Agnes Carvel, obtained the Foreign Judgment in the High Court of Justice, Chancery Division in London, England in January, 2004. Before attempting to confirm the Foreign Judgment

in the federal court in New York, Carvel sought to domesticate the Foreign Judgment in a Florida state court, and transfer the judgment to New York. Carvel initially was successful in domesticating the Foreign Judgment in Florida, but when she sought to transfer the domesticated judgment to New York, investigation revealed that she had fraudulently failed to provide notice to interested parties, either in New York or in Florida.

Subsequently, when those facts were brought to the attention of the Circuit Court in Florida, the domesticated judgment was vacated, upon a finding by the Florida court that "there was strong evidence of a fraud upon the court perpetrated by [Carvel] in both the proceedings before the High Court and this Court." (SA 40 and App. 9)

When the domesticated judgment was vacated in Florida, Carvel then sought to have the Foreign Judgment confirmed in the New York District Court for the Eastern District of New York. That court dismissed the action, holding that it lacked subject matter jurisdiction pursuant to the "probate exception." (App. 11-12). Thereafter, on August 1, 2007 the Court of Appeals for the Second Circuit affirmed the district court's order, forming the basis for the instant petition. (App. 1-4).

While the appeal was pending in the Second Circuit, but after briefing, on June 11, 2007, the High Court of Justice, Chancery Division:

1) Removed Pamela Carvel as personal representative (Executor), and appointed in her place Mr. Guy Greenhaus, as judicial trustee; and

2) Set aside the order underlying the Foreign Judgment.

Thomas and Agnes Carvel Foundation, claimant v. Carvel and Carvel Foundation, Inc., defendants [2007] EWHC 1314 (Ch.), 4 All ER 81.

Permission to appeal the decision and order of the High Court of Justice was denied on October 11, 2007. *See The Thomas & Agnes Carvel Foundation v. Carvel & Ors*, A3/2007/1628.

B. Facts Relating to the Probate Exception Issue (Which Need Not Be Considered if the Court Denies the Writ on Grounds of Justiciability)

Agnes Carvel died on August 4, 1998 while residing in the United Kingdom. (SA 37). Her last will and testament was admitted to probate in the United Kingdom (SA 37), and Carvel was appointed as the representative of Agnes Carvel's domiciliary estate. (SA 13). Since significant assets of the estate were located in New York, since there were disputes regarding the distribution of such assets, Letters of Ancillary Administration c.t.a. were issued to Intervenor Leonard Ross ("Ross"). (SA 45-47).

Thereafter, all estate proceedings relating to this matter in New York were overseen by the Surrogate's Court of Westchester County.

There has been extensive and virtually continuous litigation regarding the estate, including (a) claims to property and the marshaling of assets, (b) claims by Respondent Thomas and Agnes Carvel Foundation, which asserts that it is the residuary

beneficiary of Agnes Carvel's Estate, (c) claims by Carvel opposing the Foundation and asserting claims that she or an entity she controls, Carvel Foundation Inc., is the residuary beneficiary under the will, (d) claims by Carvel as purported executor and creditor of the Estate for millions of dollars in payments and (e) claims by Ross to effectuate the marshaling of estate assets, as well as countless other financial and monetary disputes. (A 13-32, 27-28, SA 145-147). These matters have been principally litigated in the Surrogate's Court, Westchester County.

Apparently dissatisfied with proceedings before the Surrogate's Court, and particularly dissatisfied with Ross's refusal to turn over to her the assets of the Ancillary Estate, Carvel embarked upon a scheme to seize millions of dollars of assets under Ross's jurisdiction and control.

Without notice to anyone, Carvel obtained a judgment of the High Court of London directing the Estate of Agnes Carvel to pay her £8,085,095.51 – the Foreign Judgment. (SA 1-8). She managed to do so by appearing in different capacities on either side of the caption, and since no other party had notice, there was no opposition to her claim.

After obtaining the Foreign Judgment, Pamela sought to use it to seize assets in New York under Ross's control. First she domesticated the Foreign Judgment in Florida, again without notice to any interested party. (SA 36). However, upon subsequent application by the Foundation, the Florida Court vacated the domesticated judgment (SA 36-40),

stating that "there is strong evidence of fraud upon the court perpetrated by Petitioner..." (SA 40).

While the Florida judgment was still in effect, Carvel initiated a proceeding to the Supreme Court, Nassau County, once again without notice. Fortunately, Ross became aware of the proceeding, and he and the Foundation were able to intervene and obtain an order referring the matter to the Surrogate's Court, Westchester County. (SA 27).

Thereafter, the Surrogate's Court issued an order staying Carvel "from proceeding to enforce or take any action with respect to any judgment with regard to or pertaining to the assets or property of the Estate, or taking any other action or proceedings to seize or interfere with the assets of the Estate..." (SA 49-50). Subsequently, by decision dated June 30, 2006, the Surrogate's Court granted Ross's motion for a preliminary injunction restraining Carvel from (1) taking any action in any court which would affect the assets of the Estate subject to the jurisdiction of the State of New York, (2) enforcing a judgment obtained by Pamela Carvel in the United Kingdom, (3) interfering with the Estate funds administered by Ross and (4) asserting authority to represent the Estate in the State of New York. (SA 158-163).

In his decision, the Surrogate specifically noted that since the Foreign Judgment exceeds the assets of the ancillary estate, which approximates $10 million, the applicability and enforceability of the Foreign Judgment would be determined by the Surrogate's Court in the pending Estate accounting proceeding (SA 162).

While the Surrogate's Court temporary restraining order was in effect, and before the Surrogate had adjudicated the accounting and distribution issues related to the assets of the Estate, Carvel initiated the proceeding underlying her petition. Once again, she did so without notice to Ross or the Foundation, and without advising the district court of the identity of these parties or of the history and background to this matter.

ARGUMENT

POINT I

JUSTICIABILITY

As stated by Chief Justice Earl Warren, "[N]o justiciable controversy is presented when the parties seek adjudication ... when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action." *See Flast v. Cohen*, 392 U.S. 83 (1968). In the instant matter, Carvel has lost standing as a result of a subsequent development, and the claim is also mooted by a subsequent development.

With neither standing nor a live issue, Carvel's petition is not properly before this Court.

A. Petitioner Currently Lacks Standing to Bring This Action

Carvel lacks standing to bring this petition, since she is no longer the Executor of the Estate of

Agnes Carvel. As set forth by the Court in *Flast v. Cohen*, 392 U.S. 83 (1968):

> The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated... [i]n other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.

Flast, 392 U.S. at 99-100.

Here, the High Court in the United Kingdom stripped Carvel of her capacity as personal representative of Agnes Carvel's estate, and she no longer has standing to request adjudication on any issue pertaining to the estate. *See Kovitz v. Cohen*, 1996 U.S. App. LEXIS 26308 (2nd Cir. 1996) (only personal representative has capacity so sue).

B. Petitioner's Claim Is Void Under The Doctrine of Mootness

This claim is currently void and must fail under the doctrine of mootness: the judgment that petitioner seeks to confirm has been set aside.

"The jurisdiction of federal courts is defined and limited by Article III of the Constitution," *Flast v. Cohen*, 392 U.S. at 94 (1968), and "[u]nder Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *See Lewis v. Continental Bank Corporation, et. al.*, 494

U.S. 472, 477 (1990) (citing *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988) and *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

In *Lewis*, the Court specifically addressed the instance when a case becomes moot during its pendency:

> This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain our jurisdiction in the present case, it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals. The parties must continue to have a 'personal stake in the outcome' of the lawsuit.

Lewis, 494 U.S. at 477-478 (citing *Deakins v. Monaghan, supra*, 484 U.S., at 199; *Steffel v. Thompson*, 415 U.S. 452, 459 n. 10, (1974), *Los Angeles v. Lyons*, 461 U. S. 95, 101 (1983).

In this matter, during the appellate stage of this proceeding, the Foreign Judgment was vacated by the High Court in the United Kingdom, causing this matter to cease to be a "live" one. Since the Foreign Judgment has now been vacated by the court in which it was originally decreed, no case or controversy remains and the claim is void for mootness.

POINT II

CHALLENGE TO THE PROBATE EXCEPTION DOES NOT MERIT SUPREME COURT REVIEW

By securing the Foreign Judgment (now void) in England, the Petitioner sought to gain control over assets and property that are within the sole custody of the Surrogate's Court of the State of New York, Westchester County. The District Court of the Eastern District of New York and Court of Appeals for the Second Circuit recognized this and dismissed the matter. Undaunted and unabashed, Petitioner now seeks a writ of certiorari, but provides no valid argument as to why her case warrants attention from this Court.

In *Marshall v. Marshall*, 547 U.S. 293, (2006), this Court addressed the issue of whether the federal courts have jurisdiction to adjudicate issues relating to the administration of property in an estate pending in a state court. The Court reviewed the matter by reference to the "probate exception": "[t]he probate exception reserves to state probate courts the probate or annulment of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court." *Marshall*, 547 U.S. at 311-312.

The Second Circuit decision in this case specifically relied upon the *Marshall* ruling, citing the above-quoted language: "Having carefully reviewed all of plaintiff's arguments, we agree with the District Court that, pursuant to the probate exception, it lacked subject matter jurisdiction to hear plaintiff's action. The Supreme Court's recent decision in

Marshall v. Marshall ... which clarified the scope of the probate exception, does not change the result." (App. 3.)

As held by the Second Circuit:

> Here, [Carvel]'s action would interfere with a complex pending proceeding in New York Surrogate's Court concerning the assets and property of the Estate. Because [Carvel]'s action 'endeavors to dispose of property that is in the custody of a state probate court,' [citing *Marshall*] the probate exception bars her from maintaining this action in federal court.

App. 3.

Petitioner raises no novel issue to be determined by this Court. Rather, she argues alternatively, i) that the probate exception is a doctrine that should not be upheld (already decided against petitioner in *Marshall*); or ii) that the Second Circuit incorrectly decided this case, on its facts. Neither argument is a basis for granting certiorari. (See Sup. Ct. R. 10) (erroneous factual findings or misapplication of a valid legal proposition is not a ground for granting a writ of certiorari).

CONCLUSION

For the reasons and authorities cited herein, as well as those set forth in the Thomas and Agnes Carvel Foundation Brief in Opposition, Respondent Leonard M. Ross, Ancillary Administrator c.t.a. of the Estate of Agnes Carvel, respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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SUPREME COURT, U.S.

No. 07-917

IN THE

SUPREME COURT OF THE UNITED STATES

PAMELA CARVEL, as Executor of the Estate of Agnes Carvel,

Petitioner,

v.

CARVEL FOUNDATION INC., a Company incorporated under the laws of the State of Florida,

Respondent.

THOMAS AND AGNES CARVEL FOUNDATION, Ancillary Administrator LEONARD M. ROSS,

Intervenors.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THE THOMAS AND AGNES CARVEL FOUNDATION'S BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the undersigned attorneys of record hereby certify that Respondent The Thomas and Agnes Carvel Foundation is a membership corporation organized pursuant to New York's Not-For-Profit Corporation Law. The Foundation has no parent corporation and no publicly held corporation is a Member of the Foundation.

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INTRODUCTION

Respondent The Thomas and Agnes Carvel Foundation (the "Foundation") respectfully submits this Brief in opposition to the Petition for Writ of Certiorari (the "Petition") submitted by Petitioner Pamela Carvel ("Ms. Carvel") in which Ms. Carvel seeks review of a Summary Order of the United States Court of Appeals for the Second Circuit (the "Second Circuit") entered on August 1, 2007.

In her Petition, Ms. Carvel, purportedly proceeding as Executor of the Estate of Agnes Carvel ("Agnes's Estate"), seeks to enforce a multi-million dollar judgment that she obtained from a United Kingdom court. She omits to disclose to the Court, however, that she has been removed from her position as Executor, and that the judgment that she seeks to enforce has been set aside by the same United Kingdom court that issued it. For these fundamental reasons, Ms. Carvel lacks standing to proceed and there is no live case or controversy. Moreover, even if the Court were to turn to the merits of the Petition, the Petition does not present any issue that warrants granting certiorari. For all of these reasons, the Petition should be denied.

COUNTERSTATEMENT OF THE CASE

A. Procedural History

On January 20, 2006, Ms. Carvel, in her capacity as Executor of Agnes's Estate, commenced a proceeding in the United States District Court for the Eastern District of New York (the "District Court," and the "District Court Proceeding," respectively) by filing with that court a Motion for Order Confirming

Foreign Judgment. (SA-8-12; App. 5).[1] By that motion, Ms. Carvel sought to enforce a judgment in an amount exceeding £8 million issued by the High Court of Justice, Chancery Division, London England (the "UK Judgment" and the "High Court," respectively). (Id.). In particular, Ms. Carvel requested the entry of an order directing payment from the New York assets of Agnes's Estate. (SA-12; SA-125-26).

Upon learning of the District Court Proceeding, the Foundation, pursuant to the District Court's Individual Practices, filed a letter with the District Court dated February 3, 2006 seeking a pre-motion conference in respect of its anticipated motions to intervene and dismiss. (SA-26-28). The New York ancillary administrator of Agnes's Estate, Leonard M. Ross, Esq. ("Mr. Ross"), filed a similar letter with the District Court on February 6, 2006. (SA-41-43).

Upon receiving the letters from counsel to the Foundation and Mr. Ross, the District Court issued an Order dated February 9, 2006 (the "February 9, 2006 Order") requiring Ms. Carvel to appear on March 9, 2006 and show cause why the Foundation and Mr. Ross should not be permitted to intervene and why the action should not be transferred to the Surrogate's Court of the State of New York for Westchester County (the "Surrogate's Court") for

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[1] In citations throughout this Brief, "App." refers to the Appendix annexed to Ms. Carvel's Petition. "SA" refers to the Supplemental Appendix for Intervenor The Thomas and Agnes Carvel Foundation submitted to the Second Circuit on or about November 29, 2006. "A." refers to the Appendix submitted by Ms. Carvel to the Second Circuit on or about October 30, 2006.

lack of subject matter jurisdiction. (A. 4). On or about March 6, 2006, Ms. Carvel filed a 70-page submission (including exhibits) opposing intervention and dismissal. (SA-54-123).

The District Court conducted a hearing on March 9, 2006 pursuant to the February 9, 2006 Order. (SA-124-142). At the hearing, the Court heard oral argument of Ms. Carvel as well as counsel to the Foundation and Mr. Ross. (Id.).

On March 29, 2006, the District Court issued a Memorandum and Order granting the Foundation and Mr. Ross leave to intervene and dismissing the District Court Proceeding for lack of subject matter jurisdiction. (App. 5-12). The District Court based the dismissal on the "probate exception" to diversity jurisdiction, concluding that an exercise of jurisdiction would "inevitably and impermissibly interfere with the Surrogate Court's 'probate proceedings,' and custody and control over Agnes' New York Estate." (App. 11-12). Judgment was entered on March 30, 2006. (A. 12).

The Second Circuit affirmed by Summary Order on August 1, 2007. The Second Circuit "agree[d] with the District Court that, pursuant to the probate exception, it lacked subject matter jurisdiction to hear plaintiff's action." (App. 3). In arriving at this conclusion, the Second Circuit applied this Court's recent ruling in Marshall v. Marshall, 547 U.S. 293, 126 S. Ct. 1735 (2006). The Second circuit reasoned:

> Marshall explained that "the probate exception reserves to state probate courts the probate or annulment of a

> will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court." [Marshall, 126 S. Ct. at 1748]; see also Lefkowitz v. Bank of N.Y. ___ F.3d ____, 2007 WL 1839756, at *12-*13 (2d Cir. June 28, 2007) (describing history of probate exception and scope of probate exception after Marshall). Here, plaintiff's action would interfere with a complex pending proceeding in New York Surrogate's Court concerning the assets and property of the Estate. Because plaintiff's action "endeavors to dispose of property that is in the custody of a state probate court," Marshall, 126 S. Ct. at 1748, the probate exception bars her from maintaining this action in federal court.

(App. 3-4).

B. The Foundation

The Foundation is a New York not-for-profit corporation. (SA-132.) As confirmed by a Decision After Trial entered by the Surrogate's Court on April 15, 2002 (the "April 15, 2002 Decision"), the Foundation is entitled to the residue of Agnes's Estate, subject to the payment of reasonable debts

and administration expenses.[2] (SA-145-154; App. 8). The Surrogate's April 15, 2002 Decision and the resulting Decree were affirmed on appeal by the Appellate Division, Second Department of the New York State Supreme Court on December 29, 2003. (SA-155-56).

C. Proceedings in the Surrogate's Court

Carvel-related proceedings have been pending in the Surrogate's Court since shortly after Thomas Carvel's death in October 1990. (App. 8). These have included numerous proceedings in the Estate of Thomas Carvel ("Thomas's Estate") to which both the Foundation and Ms. Carvel have been parties. (Id.).

Agnes Carvel, Thomas's wife, died in London, England in August 1998. (App. 8; SA-37). Ms. Carvel probated Agnes's will in the High Court, and the High Court appointed her personal representative of Agnes's Estate. (SA-37; SA-55). Mr. Ross subsequently was appointed New York ancillary administrator of Agnes's Estate. (SA-45-47). In that capacity, Mr. Ross marshaled New York assets of Agnes's Estate worth several millions of dollars. (SA-162). Under the terms of the Surrogate's April 15, 2002 Decision and the corresponding Decree, Mr. Ross is prohibited from distributing the assets that he has marshaled

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[2] Although the Surrogate, in his April 15, 2002 Decision, held that the Foundation was entitled to the assets at issue in that proceeding (including all income due from Thomas Carvel's Estate to Agnes's Estate) subject to the payment of reasonable debts and administration expenses (SA-152-153), the Surrogate has more recently indicated that there are fact issues that must be resolved to determine the proper disposition of the "income component" of Agnes's Estate. (SA-167).

pending further order of the Surrogate's Court. (SA-154).

On June 6, 2005, Mr. Ross commenced a proceeding in the Surrogate's Court seeking judicial approval of his final accounting as New York ancillary administrator of Agnes's Estate (the "Ross Accounting Proceeding"). (SA-164-168). Mr. Ross cited both Ms. Carvel and the Foundation as parties interested in the Ross Accounting Proceeding, and both Ms. Carvel and the Foundation objected to Mr. Ross's accounting. (SA-164). A trial of the issues presented in the Ross Accounting Proceeding commenced in May 2007. However, after the removal of Ms. Carvel as Executor of Agnes's Estate, discussed below, the trial was adjourned sine die. It has not resumed, and no date is scheduled for the trial to resume.

Among the issues to be tried in the Ross Accounting Proceeding is the ultimate disposition of the assets in the ancillary estate. (SA-167).

D. The UK Proceeding

In June 2003, Ms. Carvel commenced an action in the High Court, captioned Pamela Carvel v. Pamela Carvel (as Executor of the Estate of Agnes Carvel), in which she sought repayment of certain purported debts that Agnes owed her and claimed expenses of administering Agnes's Estate. (SA-86 ¶ 11). This proceeding was brought without notice to the Foundation, or any other interested party except

for an entity that Ms. Carvel controlled.[3] (App. 9). On May 6, 2004, Ms. Carvel obtained a judgment from the High Court ordering the Estate to pay her £8,085,095.51 and costs (the "UK Judgment"). (App. 5; SA-1).

On April 14, 2005, Ms. Carvel applied to the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida (the "Broward County Court") for an order domesticating the UK Judgment. (SA-38). She again did so without notice to the Foundation or any other interested party. The Broward County Court entered an order domesticating the UK Judgment (the "Florida Domestication Order") on May 10, 2005. (Id.). Ms. Carvel then sought to execute the judgment against several million dollars held by Mr. Ross, as New York ancillary administrator, by commencing an action in the Supreme Court of the State of New York for Nassau County (the "Nassau County Supreme Court"). She brought this proceeding, too, without notice to any interested party. (SA-160). The assets against which Ms. Carvel sought to enforce the judgment were a substantial portion of the same assets marshaled by Mr. Ross that are the subject of the Ross Accounting Proceeding.

Mr. Ross, upon learning of the judgment and Ms. Carvel's effort to enforce it against assets that he had marshaled, sought and obtained temporary restraining orders from both the Nassau County

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[3] Carvel Foundation, Inc., a Florida corporation of which Ms. Carvel was a director, was substituted as the defendant on July 24, 2003 after the High Court refused to permit Ms. Carvel to proceed by essentially suing herself. (SA-5-6).

Supreme Court and the Surrogate's Court that prohibited Ms. Carvel from, *inter alia*, "taking any action to enforce the [UK Judgment] obtained by Pamela Carvel with regard to assets and property of the Estate." (App. 10-11).

On Mr. Ross's motion, the Surrogate's Court subsequently converted its temporary restraining order into a preliminary injunction, holding that "[t]he ancillary estate and its creditors will be irreparably harmed if Pamela is allowed to execute on all of the assets which comprise the estate." (SA-161-62). The Surrogate's Court further explained:

> [I]t is this court which has jurisdiction over the assets in the ancillary estate, and it is this court that needs to be satisfied as to the validity and the enforceability of the UK judgment inasmuch as the judgment exceeds the assets of the ancillary estate which approximate $13 million.

(SA-162; see also id. at 166 (stating that the Surrogate's Court has "exclusive jurisdiction over the assets of the ancillary estate and has the responsibility to insure that the estate is settled and distributed.")).

On January 10, 2006, on the Foundation's motion, the Broward County Court stayed the Florida Domestication Order. The Broward County Court then vacated the Florida Domestication Order by an order entered on January 31, 2006 (the "January 31 2006 Order"), finding "strong evidence of fraud." (App. 9; SA-36-40). The January 31, 2006 Order was affirmed on appeal by the District Court

of Appeal of the State of Florida, Fourth District, on October 11, 2006. (SA-157).

Despite the two temporary restraining orders prohibiting her from doing so, on January 20, 2006, Ms. Carvel commenced the District Court Proceeding by filing her Motion for Order Confirming Foreign Judgment against the Estate of Agnes Carvel in the District Court. (SA-8-12). Ms. Carvel captioned the District Court Proceeding "Pamela Carvel (as Executor of the Estate of Agnes Carvel) v. Carvel Foundation, Inc. (A Company incorporated under the laws of the State of Florida)." (App. 5, 2; SA-8). She did not name as parties, or give formal notice to, either the Foundation or Mr. Ross. (App. 10).

E. Misstatements of Fact Pursuant to Supreme Court Rule 15.2.

The misstatements of fact in Ms. Carvel's Petition are legion, and the Foundation will not address each of them in this Brief. However, it will address two particularly noteworthy omissions that relate directly to the question whether certiorari should be granted. First, Ms. Carvel omits to disclose that she is no longer Executor of the Estate of Agnes Carvel, the capacity in which she purports to bring her Petition. The High Court removed her from that position, on the Foundation's application, in June 2007. See Thomas and Agnes Carvel Foundation v. Carvel [2007] 4 All ER 81 at 96. Second, Ms. Carvel also omits to disclose that the High Court set aside the UK Judgment that is the subject of the Petition. Id. Ms. Carvel sought to appeal these rulings, but the UK Courts have denied her such leave, and she has now exhausted all

avenues to seek an appeal to a United Kingdom court.

SUMMARY OF THE ARGUMENT

Ms. Carvel is no longer Executor of Agnes's Estate, the capacity in which she seeks certiorari, and the UK Judgment that is the subject of the District Court Proceeding has been set aside. Accordingly, Ms. Carvel does not have standing to bring this appeal and there is no live case or controversy.

Moreover, even if the Court were to reach the merits, Ms. Carvel has established no compelling reason for the Court to grant her Petition. The Second Circuit properly affirmed the District Court's dismissal of the District Court Proceeding for lack of subject matter jurisdiction. In so doing, the Second Circuit correctly applied this Court's holding in Marshall to the facts of this case. Even if this Court had a question whether the Second Circuit's application of Marshall was correct – and there is no reason to have such a question – this would not justify granting certiorari. Ms. Carvel does not point to an important question of federal law that requires resolution by this Court or any other compelling basis for review by this Court. Nor does the dismissal of the District Court Proceeding consistent with this Court's well-established precedents present any constitutional issue that merits review.

For all of these reasons, the Court should deny the Petition.

ARGUMENT

I. Ms. Carvel Lacks Standing

By order of the High Court, Ms. Carvel has been removed as Executor of the Estate of Agnes Carvel – the capacity in which she brought the lower court proceedings and her Petition. Thomas and Agnes Carvel Foundation v. Carvel [2007] 4 All ER 81. Accordingly, she no longer has standing to pursue the Petition. See, e.g., Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589, 592, 87 S. Ct. 675, 678 (1967) (finding resigned teacher no longer had standing to pursue claims in his capacity as a teacher); Karcher v. May, 484 U.S. 72, 108 S.Ct. 388 (1987) (finding that members of the legislature entering into a suit in their official capacity did not have standing to appeal the judgment after they no longer held office; rather, the authority to pursue the lawsuit belonged to their successors); Kovitz v. Cohen, 1996 U.S. App. LEXIS 26308 (2d Cir. 1996), at *3-*4 ("[New York's] Estates Powers and Trusts Law provides that any action for or against the property of a decedent must be by or against the executor or administrator in his or her representative capacity.... [Appellant] lacks standing to pursue this appeal. [Appellant] is not the estate administrator, and he has pursued this appeal and the motion underlying it in his individual capacity.").

The Petition should be denied for this reason alone.

II. There Is No Live Case Or Controversy

Even if the Court were to find that Ms. Carvel did have standing to bring the Petition, the Petition would nonetheless properly be denied because a

favorable judgment would not give Ms. Carvel any relief. In the same decision that removed Ms. Carvel as Executrix of Agnes's Estate, the High Court set aside the UK Judgment that is the subject of the Petition. Thomas and Agnes Carvel Foundation v. Carvel [2007] 4 All ER 81. Accordingly, there is no longer any foreign judgment to enforce, no relief to be granted, and thus, no case or controversy. See Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324 (1984) ("[R]elief from the injury must be 'likely' to follow from a favorable decision.") (quoting Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 at 38, 96, S. Ct. 1917, 1924 (1975)); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107, 118 S. Ct. 1003, 1019 (1998) (stating that relief must "remedy the injury suffered"); British Int'l Ins. Co. v. Seguros la Republica S.A., 354 F.3d 120, 122-23 (2d Cir. 2003) ("The mootness doctrine provides that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. A case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.") (internal quotations and citations omitted).

Here, even if this Court were to reverse the Second Circuit and determine that the District Court did have subject matter jurisdiction to hear the dispute, there no longer would be any dispute to resolve. The foreign money judgment that is the subject of the District Court Proceeding has been vacated, and thus can no longer be "confirmed." Accordingly, there is no live case or controversy.

For this reason too, the Petition should be denied.

III. There Is No Compelling Reason To Grant Certiorari

Because Ms. Carvel lacks standing and there is no live case or controversy, this Court need not reach the merits of the Petition. However, even if the Court were to consider the merits, the Petition does not present any valid basis to grant certiorari.

In determining whether to grant certiorari, the Court considers whether a "United States court of appeals has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).[4] Neither of these situations is present here because the lower courts simply applied the probate exception to diversity jurisdiction consistent with prior Supreme Court precedent.

The lower courts decided the case consistent with this Court's recent decision in Marshall and prior precedent. As this Court recognized in Marshall, the probate exception is a particular application of the more general principle that a federal court may not exercise diversity jurisdiction where doing so would interfere with a state court's administration of assets over which the state court already has exercised jurisdiction. Marshall, 547 U.S. at 312, 126 S. Ct. at 1748. The District Court, applying prior Supreme Court precedent, recognized

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[4] Supreme Court Rules 10(a) (regarding Circuit splits) and 10(b) (regarding conflict among the highest court of a state and either the highest court of another state or of a Circuit Court) clearly do not apply and will not be discussed.

this principle, stating that federal courts "'may not exercise jurisdiction to adjudicate rights in such property where the final judgment' will 'interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court.'" (citing Markham v. Allen, 326 U.S. 490, 494, 66 S. Ct. 296, 298 (1946)) (App. 7). Although Marshall had not yet been decided at the time of the District Court's Memorandum and Order, the Second Circuit explicitly affirmed the District Court on the rationale of Marshall. (App. 3-4).

The lower courts' rulings are correct because enforcing the UK Judgment necessarily would have interfered with the Surrogate's ongoing administration of estate assets. As the District Court observed, the Surrogate's Court has presided over "extensive, contentious litigation" concerning Carvel family assets since shortly after Thomas Carvel's death in October 1990. (App. 8). This includes the Ross Accounting Proceeding in which the Surrogate's Court has already exercised jurisdiction over the very assets against which Ms. Carvel seeks to execute the UK Judgment. Because the Surrogate's Court "has exclusive jurisdiction over the assets of the ancillary estate and has the responsibility to insure that the estate is settled and distributed," the lower courts rightly determined that the probate exception applies, and the District Court thus lacked subject matter jurisdiction. (SA-166).

Even if the Second Circuit had misapplied Marshall (which, of course, the Foundation does not believe that it did), mere error is not a compelling reason for the Court to grant certiorari. See Sup. Ct.

R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Ms. Carvel attempts to confuse the issue by asserting that the probate exception applies differently to foreign executors. (See, e.g., Petition at 10). She fails, however, to provide any logical or legal basis for this contention. The operative consideration in determining whether the probate exception applies is whether a state court has already assumed control of a *res* and whether the federal court's exercise of diversity jurisdiction would interfere with the state court's administration of that *res*. See, e.g., Marshall, 547 U.S. at 312; 126 S. Ct. at 1748. Whether Ms. Carvel brought the District Court Proceeding as an executor of an Estate domiciled within the State of New York or a foreign country is immaterial to this consideration. The District Court did not decline to exercise jurisdiction on the ground that Ms. Carvel was bringing the proceeding in her capacity as a foreign executor; rather, it declined jurisdiction because the Surrogate already had exercised jurisdiction over Agnes's Estate, and the District Court Proceeding would have interfered with the Surrogate's administration of that estate. (App. 8). The Second Circuit held likewise in affirming the District Court. (App. 4). None of this presents a novel or important issue that merits this Court's review.

IV. The Dismissal Of The District Court Proceeding For Lack Of Subject Matter Jurisdiction Does Not Raise Any Constitutional Issues

Ms. Carvel purports to raise a number of constitutional objections in her Petition. They are all misplaced.

Every court is required to determine whether it has subject matter jurisdiction over a case in order to hear it. See Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action"); Louisville & N.R. Co. v. Mottley, 211 U.S. 149, 152, 29 S. Ct. 42, 43 (1908); Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., 109 F.3d 105, 107-10 (2d Cir. 1997). Here, the District Court correctly determined that the probate exception applied, and that it was therefore without jurisdiction to hear the controversy.

There can be no constitutional issue associated with the dismissal of the District Court Proceeding for lack of subject matter jurisdiction consistent with this Court's well-established precedents. See, e.g., Marshall, 547 U.S. at 311; 126 S. Ct. 1735 at 1748 ("[W]hen one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*."); Markham v. Allen, 326 U.S. 490, 494, 66 S. Ct. 296, 298 (1945) (stating that federal courts may not "interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court."); Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 466, 59 S. Ct. 275, 280 (1939) (holding that federal court jurisdiction

must yield to a prior exercise of state court jurisdiction over a *res* when the property has actually been seized under judicial process and when suits "are brought to marshal assets, administer trusts, or liquidate estates . . . where to give effect to its jurisdiction, the court must control the property."); Penn Gen. Cas. Co. v. Pennsylvania ex rel. Schnader, 294 U.S. 189, 195, 55 S. Ct. 386, 389 (1935) ("[I]f the two suits are *in rem* or *quasi in rem*, requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other."); Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 44, 30 S. Ct. 10, 12 (1909) ("The courts of the United Sates, while they may exercise the jurisdiction, and may make decrees binding upon the parties, cannot seize and control the property which is in the possession of the state court.").

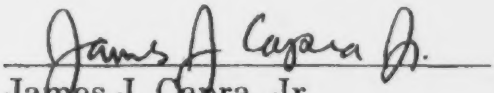
When the District Court determined that the probate exception applied, it was bound to dismiss the case, which it did. The Second Circuit correctly affirmed. Ms. Carvel does not, and cannot, point to any legitimate constitutional questions raised by that dismissal.

In short, Ms. Carvel has failed to identify any compelling reason for the Court to grant certiorari. There is none, and the Court should deny the Petition accordingly.

CONCLUSION

For the reasons and upon the authorities set forth above, Respondent the Thomas and Agnes Carvel Foundation respectfully requests that the Petition be denied.

Respectfully submitted,



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IN THE

Supreme Court of the United States

PAMELA CARVEL, as Executor of the Estate of Agnes Carvel

Petitioner,

V.

CARVEL FOUNDATION INC., a Company incorporated under the laws of the State of Florida,

Respondent.

THOMAS AND AGNES CARVEL FOUNDATION, Ancillary Administrator LEONARD M. ROSS,

Intervenors

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITIONER'S REPLY BRIEF FOR WRIT OF CERTIORARI

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REPLY BRIEF

The intervenors failed to address the questions presented (Petitioner's Brief ("Brief"), page i). The new issues raised are standing and mootness; however they are based on incorrect facts and cases. The foreign-creditor claims asserted are alive and active in the High Court.

Intervenors made the same arguments since 1998 in New York Surrogate's Court to deny jurisdiction and standing (Brief, IV, page 21-24). Petitioner as executor in England and ancillary administrator in Delaware was not faced with a choice of courts --- the only court available was/is federal district court.

SUBSEQUENT EVENTS

"This application based on Constitutional questions, deals only with the probate exception to subject matter jurisdiction asserted by the lowers courts. Continuing events in the Estate remain on-going subjects of criminal investigations against the foundation usurpers ("intervenors"), as do Pamela Carvel's efforts, and appeals, on a *pro se* basis against the multi-million dollar litigation machine funded by the Carvels' restricted charitable gifts" (Brief, page 8).

The foundation usurpers hired about 10 solicitors and spent over $1 million of restricted Carvel donations to prevent Pamela Carvel from asserting the intentions of Agnes Carvel by replacing Pamela on June 11, 2007 with the foundation usurper's paid solicitor as "judicial trustee". No fiduciary represents the rights of named beneficiaries or creditors of the

Estate, only the foundation usurpers. Human rights violations are asserted in England.

The High Court order called for resubmission, on October 1, 2007, of existing claims and Pamela's accounting. Contrary to the intervenors statements, Pamela remains the accounting executor and the claims remain actively asserted.

There was never any evidentiary "finding" of fraud against Pamela Carvel in any jurisdiction. The assertions against Pamela Carvel (appearing *pro se*) are the words crafted by the foundation usurpers to be incorporated into judicial insinuations as retaliation to discredit Pamela for assisting law enforcement.

A finding of "fraud" in London required a full jury trial, which did not happen because the foundation usurpers withdrew their claim of fraud, and also withdrew their claim to be named sole beneficiary of the Estate. The statements speculating and inferring fraud, in decisions were directly hammered into the decision by the foundation usurpers' lawyers who scripted the documents. The words used by Westchester Surrogate's Emanuelli and Scarpino (who are suspected of collusion in bribery by the foundation usurpers) were expressly recited as directed by the foundation usurpers in their papers.

By contrast, Pamela assisted the F.B.I. and New York Attorney General in four felony convictions and the forced ouster of two foundation fraudsters.

INTERVENORS

The intervenors caused 18 years of wasting of Carvel asset to perpetuate their lawyer annuity that has made these lawyers millionaires (Brief pages 6,22) while every penny of $300 million of the Carvels' 70 years lifetime work disappeared into the hands of strangers without benefit to legitimate charity or to the Carvels as sole rightful owners.

As sole adjudicated Member of the Thomas and Agnes Carvel Foundation, Pamela Carvel denounces the Brief submitted by Orrick as not being by the legitimate Foundation but submitted by attorneys for the individuals who through forgery usurped the Foundation's identity for illicit purposes and personal profit (Brief page 5-6).

Pamela Carvel has petitioned the New York Attorney General to dissolve this illegitimate entity for abusing the Carvels' good name and restricted charitable gifts, and tax fraud. That matter is pending in U.S. District Court for New York Northern District (07-cv-01034-LEK-RFT).

Pamela Carvel has just been advised that it is well settled by the Appellate Courts of New York that all matters are stayed upon the death of a party and any determination rendered without substitution are generally deemed a nullity (*Weber v. Bellinger*, 124 AD2d 1009; *Matter of Einstoss*, 26 N.Y.2d 181, 187, 189, 309 N.Y.S.2d 184, 257 N.H.2d 637[1970]; *Meehan v. Washington*, 242 A.D.2d 286, 287, 660 N.Y.S.2d 737 [1997]).

The lack of proper substitution of a party in an action renders all subsequent orders null and void as

the court lacks jurisdiction (*Bossert v. Ford Motor Co.* 140 AD2d 480, 528 N.Y.S.2d 592, 1988 N.Y. App.Div.; *Brown v. Konczeski,* 242 A.D.2d 847, 661 N.Y.S.2d 891, 1997 N.Y. App. Div.

In this case, Agnes Carvel's death was procured on August 4, 1998 from stress induced by the foundation usurper's extortion tactics by cutting off all money to 89-year-old Agnes, even after her doctor warned that such foundation-usurper tactics would be fatal. In Thomas Carvel's estate when all proceedings were required to be stayed, two Orders to Show Cause were initiated by Orrick on August 12, 1998 purporting to restrain funds belonging to Agnes, and on August 17, 1998 purporting to restrain real estate and assert the "Agreement" contract. These apparently illegal actions are the basis for the intervenors alleged interest.

Pamela Carvel knows, in fact, that there are numerous pending investigations by the U.S. Department of Justice concerning judicial corruption in New York and Westchester County where foundations usurpers apparently paid over $400,000 from the Bank they own to Surrogate Scarpino just prior to obtaining favorable decisions and just prior to the Surrogate ignoring $10 million in fraudulent conveyances. All the foundation usurpers' decisions obtained through bribery may be voided.

Pamela Carvel asserts that the intervenors are engaged in a pattern of criminal enterprises pursuant to 18 USC §241 (Conspiracy against rights), §242 (Deprivation of rights under color of law) and other Federal and state statutes for the protection of inalienable rights.

Pamela Carvel further asserts that the intervenors are engaged in obstruction of justice including, but not limited to, violations of 18 USC §1512 (Tampering with a witness, victim, or an informant) and §1513 (Retaliating against a witness, victim, or an informant); also to deprive the Carvels' of equal rights under the U.S. Constitution and 42 USC §1981 (Equal rights under the law), 42 USC §1982 (Property rights of citizens), and 42 USC §1985 (Conspiracy to interfere with civil rights).

Pamela has the right to seek redress of such abuses pursuant to state and federal laws, including 42 USC §1983 (Civil action for deprivation of rights), 42 USC §1986 (Action for neglect to prevent), and 42 USC §1988 (Proceedings in vindication of civil rights). All these violations are aggravated by the denial of equal indemnification and denial access to all state and federal courts to assert the claims for payment.

Since the abuse of charitable donations violates Thomas and Agnes Carvel's intent, and since the stated purpose of the removal of Pamela Carvel is not for any benefit to the Estate or charity, but to obstruct Pamela Carvel's assertion of rights in all courts, the "probate exception" becomes a weapon for persecution and deprivation.

STANDING

Not one citation by the intervenors supports their concept that existing debts incurred by a fiduciary-creditor are extinguished when the fiduciary is replaced. Much to the contrary, Westchester Surrogates Court directed legal fees be paid for

trials Pamela Carvel participated in as resigned executor of Thomas Carvel's estate, eight years after Pamela Carvel ceased acting as executor. That same decision declined jurisdiction over all other claims (June 30, 2003, Brief, page 21-22).

Arguments put forth by intervenors confuse citizen standing to sue under Article III of the *U.S. Constitution* with the legal standing of a creditor under the *Uniform Fraudulent Transfer Act* ("UFTA") and the *New York Debtor and Creditor Law*. District Court did not raise Article III objections to jurisdiction, but accepted diversity jurisdiction under 28 U.S.C. 1332 (App.5).

Clearly stated throughout Petitioner's Brief, the issue before the Court is one of a foreign creditor with claims incurred on behalf of the deceased and the Estate. The validity of itemized claims with backup were never addressed by any court where the intervenors instigated dismissal. Each court addressed perceived flaws only in the procedure used by a *pro se* litigant who is denied mandatory equal indemnification by those who seek to conceal a pattern of criminal activity against the Carvels and government.

"The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962)." *Flast v. Cohen*, 392 U.S. 83 (1968).

The Estate and the executor's claims against the Estate remain open and active. Pamela Carvel remains the accounting executor, and remains Delaware ancillary administrator. The same creditors' claims remain. The same parties are involved. The same question of asserting the claims in New York exists. It remains that violations of rights were made against Pamela, who remains fiduciary-creditor.

Even if all factors were not the same, it is relevant whether the District Court obstructed the fiduciary-creditor's guaranteed rights, thereby fostering or influencing subsequent events resulting in intervenors violations of the UFTA to defraud Pamela by fraudulent conveyance of over $10 million in property in December 2006, without court approval, without notice to the Estate, without notice to Pamela or other beneficiaries or creditors.

There remains "harm in fact" by intervenors and District Court, if Pamela Carvel is denied all forums to assert Carvel claims against Carvel funds, and then all funds disappear. A favorable decision would be likely if Pamela Carvel had equal professional representation before an objective federal court, given that all identical expenses by all fiduciaries adverse to Agnes Carvel have been paid in full from Agnes' funds, without court order, and without notice to the Estate, without notice to Pamela or other beneficiaries and creditors.

Under UFTA (in New York, *Debtor and Creditor Law*, Chapter 12) Pamela Carvel's standing remains as creditor of Agnes Carvel and the Estate for expenses incurred as a fiduciary, "whether or not the

right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." (*UFTA*, Sec.1(3))

A creditor is not required to obtain a judgment against the debtor-transferor or to have a matured claim in order to proceed under UFTA. *American Surety Co. v. Conner*, 251 N.Y. 1, 166 N.E. 783, 65 A.L.R. 244 (1929); 1 G. Glenn, *Fraudulent Conveyances and Preferences* 129 (Rev.ed. 1940).

In *Rogers v. Girard Trust Co.*, 158 F.2d 239, 242 (6th Cir. 1947), the court held that the federal court had diversity jurisdiction because an action for right to damages for fraud and wrongful performance of fiduciary duty is an *in personam* action to establish a personal right against a fiduciary and does not in any way affect possession of and control over the res by the Orphans Court.

"Although a prior federal court judgment on the issues of the date and method of valuation would be binding on the state court, the judgment, in itself, is not interference. *See* Markham, 326 U.S. at 494. The district court's conclusion to the contrary was erroneous. Thus, we hold that the probate exception to federal jurisdiction does not bar Plaintiff's request for a declaration of his rights" *Uzielli v. Frank; Cooper*, 137 Fed. Appx. 795; 2005 U.S. App.

Intervenors know it is false to represent that a former executor lacks standing to have administrative expenses paid. Two foundation usurpers, ousted by the New York Attorney General, continued to claim legal fees that were paid for ten

years after the usurpers ceased to act as executors. Intervenors opposed and lost their attempt to prevent payment of Pamela Carvel's legal fees as former executor in Thomas Carvel's estate for trials and lost their attempt to have all estate claims adjudicated in Westchester Surrogate's Court (June 30, 2003, Brief page 21-22).

CONTROVERSY

Not one issue before the Court is moot. Every citation by the intervenors is not relevant to the continuing claims of a foreign creditor, whether as a fiduciary or not. UFTA defines claim, creditor and debtor (*UFTA*, Sec.1(3),(4)). UFTA does not required a claim to be reduced to a judgment. The claims here involved remain active claims in the High Court of Justice in London.

"Justiciability is itself a concept of uncertain meaning and scope...it remains true that "[j]usticiability is ...not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures" *Poe v. Ullman*, 367 U.S. 497, 508 (1961)." *Flast v. Cohen*, 392 U.S. 83 (1968).

A controversy as to the existence of a debt and lien on property to secure it, or other equitable right in property in the hands of an administrator or executor, may be adjudicated and determined by a court of equity without seizing or taking actual possession of the property on which the lien rests. *Wylie v. Coxe*, 15 How. 415; *McComb v. Frink*, 149 U.S. 629; *Canfield v. Canfield*, 56 C.C.A. 169; S.C., 118 Fed. Rep. 1; *Richardson v. Green*, 9 C.C.A. 565;

S.C., 61 Fed. Rep. 423; *Van Bokkelen v. Cook*, 5 Saw. 587; S.C., Fed. Cas. No. 16,831; *Snyder's Admr. v. McComb's Exr.*, 39 Fed. Rep. 292.

"[F]ederal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Markham*, 326 U.S. at 494 (citing Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 43 (1909)).

The federal court's jurisdiction also extends to situations where the district court's judgment will not interfere with the state court's possession of the probate property, except to the extent that the state court must abide by the judgment of the federal court regarding the right it adjudicated. *Markham v. Allen*, 326 U.S. 490, 494, 90 L. Ed. 256, 66 S. Ct. 296 (1946).

The Court clarified somewhat the meaning of the word "interfere," holding the mere fact that the state probate court—when ultimately distributing the estate—would be bound to recognize the rights adjudicated in the federal court would not constitute an interference with the state probate proceedings. *Markham*, 326 U.S. at 494.

The debt thus established, however, "must take its place and share of the estate as administered by the probate court; and it cannot be enforced by process directly against the property of the

decedent." *Byers v. McAuley*, 149 U.S. 608, 620 (1893). *Accord Waterman*, 215 U.S. at 44.

The circuit Court will confine its action to the determination, protection and enforecement of the equitable rights of the citizen of a different State than that of the administrator. *Byers v. McAuley*, 149 U.S. 608; *Sherman v. American Cong. Assn.*, 51 C.C.A. 329; S.C., 113 Fed. Rep. 609".

GRANT CERTIORARI

The issue presented is that of a foreign creditor's rights to assert a claim against the U.S. assets of a foreign estate. The greater underlying issue is the systematic denial of rights by Surrogate's Court to divert estate and trust assets to strangers; and the federal courts' culpability in defrauding the victims and the government by invoking the "probate exception" thereby denying every possible forum for equal treatment, redress and due process.

The "probate exception is one of the most mysterious and esoteric branches of the law of federal jurisdiction". *Dragan v. Miller*, 679 F.2d 712, 713 (7th Cir. 1982).

"[T]he contours of the exception are vague and indistinct." *Georges v. Glick*, 856 F.2d 971, 973 (7th Cir. 1988).

"Despite its long and undisputed viability, the probate exception is not easily applied to particular cases." *Rice v. Rice Foundation*, 610 F.2d 471, 475 (7th Cir. 1979).

The line of demarcation between jurisdiction of state and federal courts in probate matters is often difficult to draw. *Foster v. Carlin*, 200 F.2d 943, 948 (4th Cir. 1952)

As to jurisdiction in suits against executors, administrators, guardians and trustees, "not infrequently the results seem inconsistent and the language confusing." *Kittredge v. Stevens*, 126 F.2d 263, 265 (1st Cir. 1942).

Intervenors do not present any argument on any of Petitioner Brief's points for grant of Certiorari (7 points, pages 8-29) other than to say the lower court was correct. Not one citation of law refutes all the new citations presented by Petitioner contradicting District Court's application of the "probate exception" and demonstrating that the "probate exception" as applied violates fundamental rights when it denies access to federal court after access to state court has already been denied.

Surrogate's Court conveniently denied hearing "foreign" claims by asserting the limited jurisdiction of the New York ancillary administration. This same argument that denied standing in state court was then asserted by the intervenors to deny Pamela Carvel standing in District Court -- that is, to deny every possible court to Pamela Carvel to assert any claim as fiduciary-creditor.

State court cannot obstruct the rights of a citizen to assert guaranteed rights in a federal court (Fourteenth Amendment, *U.S. Constitution*).

The District Court admitted federal jurisdiction by diversity, but refused to exercise jurisdiction pursuant to the "probate exception" (App. 6).

The history of litigation in Surrogate's is full of decisions declining jurisdiction over foreign claims (even from other states) or denying standing of the foreign fiduciary as creditor (Brief IV).

Contrary to the citations used by intervenors, Pamela presents both diversity and federal questions, impacting on U.S. civil rights and international human rights. The probate exception returns widows and their advocates to the dark times when some persons were without all rights before state courts, and without any avenue of redress supported by federal courts. Equal treatment and equal access to justice guaranteed by U.S. laws is the strongest possible reason for granting certiorari on rejecting the "probate exception".

Respectfully submitted,

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